89- 1575

No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1989

GAETANO VASTOLA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED

1. As argued before this Court on February 28, 1990, in *United States v. Rios*, No. 89-61, when the Government offers no satisfactory explanation for a lengthy delay in sealing tape recordings of conversations obtained by court-authorized electronic surveillance, must those recordings be suppressed even though the defendant does not make a showing that the integrity of the recordings was impaired?

2. Where the Government violated unsealing orders by releasing the original tapes to a private individual for thirty-five days, whether Petitioner, on a motion to suppress the tapes, was required to demonstrate that they had been tampered with?

3. Was the court of appeals correct in holding that the rule of *United States v. Powell*, 469 U.S. 57 (1984), upholding inconsistent jury verdicts, invalidated the district judge's determination that the jury failed to find Petitioner committed at least two racketeering acts, a prerequisite to a verdict of guilty for engaging in the affairs of an enterprise through a pattern of racketeering activity?

4. Where a RICO count of an indictment alleges that the pattern of racketeering activity consists of certain offenses also charged as non-RICO offenses, and expressly incorporates those offenses by reference, whether a guilty verdict on the RICO count may stand even though the verdicts on non-RICO offenses demonstrate a finding of guilt with respect to one racketeering act only?

## QUESTIONS PRESENTED – Continued

5. Whether, in order to be convicted of a RICO conspiracy, a person must agree to commit personally a predicate act or whether the person must merely agree to the commission of the act, a question as to which the circuits are in conflict?

6. Where the court of appeals holds that there was insufficient evidence that Petitioner participated with others in the affairs of an enterprise though collection of an unlawful debt, whether there may nevertheless be sufficient evidence that Petitioner conspired with them to conduct the affairs of an enterprise through collection of the same debt?

7. Where a jury's verdict of guilt could be supported on one ground but not others, was the court of appeals right, in light of the rule of *United States v. Powell*, 469 U.S. 57 (1984), to speculate that the verdict was based on the proper ground, because a different conclusion would suggest inconsistency in the verdicts?

## PARTIES TO THE PROCEEDING

In addition to the named parties, Elias Saka was a party in the courts below and joins in this petition, pursuant to Rule 12.2, with respect to the first two questions presented.

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No. _____

In The

# Supreme Court of the United States

October Term, 1989

GAETANO VASTOLA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals, not yet reported, is reprinted in the appendix at App. 1. The opinion of the district court, reported at 670 F.Supp. 1244, is reprinted in the appendix at App. 76. A second opinion of the district court, unpublished, is reprinted in the appendix at App.

168. A third opinion of the district court, delivered from the bench, is reprinted in the appendix at App. 177.

## JURISDICTION

The judgment of the court of appeals was entered on March 20, 1990. This petition for a writ of certiorari is filed within ninety days of that judgment in compliance with Rule 13. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 1962 provides in pertinent part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Title 18, United States Code, Section 2518(8)(a) provides:

> The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable

device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

## STATEMENT OF THE CASE

1. Petitioner was indicted in the District of New Jersey for three RICO offenses – conducting the affairs of an enterprise through a pattern of racketeering activity, 18 U.S.C. § 1962(c), conducting the affairs of an enterprise through collection of unlawful debt, 18 U.S.C. § 1962(c), and conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity and collection of unlawful debt, 18 U.S.C. § 1962(d) – and various other federal offenses. The Government's trial proof would consist principally of tape recordings of conversations intercepted pursuant to court orders.

2. In his pretrial motions, Petitioner moved to suppress certain of those recordings on the grounds that the Government had failed to submit them promptly to a judge for sealing, as required by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), specifically 18 U.S.C. § 2518(8)(a). At issue were 185 reels of tape recordings intercepted pursuant to an order obtained on March 15, 1985, and two orders of extension. Although the eavesdropping authorized by those orders terminated on May 31, 1985, the recordings were not presented for sealing until July 15, 1985 forty-five days later.[1]

In responding to Petitioner's motion to suppress, the Government offered no explanation for the delay.[2] Rather, the Government maintained that suppression was not warranted, because "the law in this circuit [is] that a delay in sealing tapes is not, in and of itself, sufficient grounds for suppression as long as the integrity of the tape recordings is preserved," citing *United States v. Falcone*, 505 F.2d 478, 483-84 (3d Cir.), *cert. denied*, 420 U.S. 955 (1974). (Government Memorandum of Law in Opposition at 109.) The district court agreed, concluding that "the integrity of the tapes has not been questioned, and thus suppression is not mandated." (App. 159)

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[1] Duplicates, rather than originals, of two of these reels were mistakenly presented for sealing, due to what the Government characterized as a "clerical error." On August 19, 1985, the originals of those tapes were finally sealed.

[2] At oral argument before the court of appeals, when asked why there was a delay in sealing the tapes, the attorney for the Government replied that she did not know why.

In the court of appeals, Petitioner, citing *United States v. Rios*, 875 F.2d 17 (2d Cir.), *cert. granted*, 110 S.Ct. 231 (1989), argued that suppression was required for lengthy, unexplained delays in sealing tapes even absent a showing of actual tampering. The court, stating that Petitioner "has not challenged the district court's finding that the tapes had not been altered," concluded: "As the district court's decision was fully consistent with *Falcone*, we will not further discuss the implications of the sealing delay." (App. 63)

3. Pursuant to several court orders, all the tapes in the case were unsealed for trial preparation and use. Just prior to trial, Petitioner discovered that the Government had sent the unsealed originals to Paul Ginsberg, a private individual it had employed to enhance and authenticate the tapes, even though he was not deputized by any court to perform that function, and Ginsberg had unsupervised possession of the tapes for thirty five days. One series of "unsealing orders," entered in the Superior Court of New Jersey and covering hundreds of reels of tape, directed that "the tapes shall be maintained in a secure place within the offices of the United States Attorney for the District of New Jersey."[3] Unsealing orders

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[3] Unlike the remaining unsealing orders, which were entered in various federal district courts and were entitled, "UNSEALING ORDER," the orders entered in the New Jersey Superior Court were entitled "ORDER FOR UNSEALING TAPES" and did not in actuality order the tapes unsealed. Rather, they provided that the tapes "be unsealed by a Judge of the United States District Court, District of New Jersey for use in the preparation and during the several trials of the matter

(Continued on following page)

entered in federal district courts in Maryland and New York directed that after the tapes are unsealed, Special Agents of the Federal Bureau of Investigation at Newark, New Jersey, shall maintain custody of the tape recordings and protect them from editing or alteration." Those orders further provided that "the Special Agents in whose custody such tape recordings are released may permit technicians working with the United States Attorney's office for the District of New Jersey to *make copies of them*." (Emphasis added.) The remaining unsealing order, entered in the district court for the District of New Jersey, did not specify where the custody of the tapes was to be maintained.

Petitioner again moved to suppress the tapes, asserting, inter alia, that the release of the original tapes to Ginsberg violated the unsealing orders and 18 U.S.C. § 2518(8)(a), which provides that "[c]ustody of the recordings shall be wherever the judge orders." The Government responded that, since Petitioner had not asserted that the tapes were altered in any way, suppression was not available for a "technical violation" of an unsealing order, citing *United States v. Falcone*, 505 F.2d 478. The

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(Continued from previous page)

known as *United States v. Gaetano Vastola, et al.*, Criminal No. 86-301." The Government never subsequently applied to the district court to unseal those tapes and, consequently, the tapes were never lawfully unsealed. The court of appeals, however, characterized this as a "technical infraction" and inexplicably concluded: "Although the government did not strictly comply with the terms of [the Superior Court's] orders, that does not negate the fact that the unsealing orders were entered and executed." (App. 66)

district court agreed, concluding that "there has been no showing by the defendants that the tapes were tainted in any way by their disclosure to Ginsberg." (App. 175)

The court of appeals noted an apparent "statutory gap" – that no section of Title III expressly defines the Government's responsibility in handling tapes subsequent to execution of an unsealing order. (App. 68-69) The court observed, however, that although the literal language of § 2518(8)(a) limits it to violations of the sealing requirement, "it strains credibility to suggest that Congress authorized the admission of all wiretap evidence which is unsealed, without regard to how the tapes were treated after unsealing." (App. 71) The court determined, therefore, that the question presented should be considered under § 2518(8)(a). (App. 69)

The court stated that the primary purpose of 2518(8)(a) is to ensure the physical integrity of the tapes, and reiterated that under *United States v. Falcone*, suppression of tapes is not appropriate where the integrity of the tapes is pure. Noting that Ginsberg gave "compelling testimony" that the integrity of the tapes was not compromised while they were in his possession and that Petitioner did not contend the tapes given to Ginsberg were tampered with, the Court concluded there was no basis for suppression. (App. 72-73)

4. The jury returned a verdict convicting Petitioner of all three RICO offenses and two non-RICO offenses. The jury either acquitted Petitioner or was unable to reach a verdict on the remaining non-RICO offenses. On Petitioner's motion, the district court set aside the verdict on the first RICO count – conducting the affairs of an

enterprise through a pattern of racketeering activity – and entered a judgment of acquittal. (App. 181) The indictment alleged that the racketeering acts comprising the pattern of racketeering activity consisted of certain of the offenses charged elsewhere in the indictment as non-RICO offenses, and expressly incorporated those offenses by reference rather them setting them forth independently in the RICO count. In addition, the court had instructed the jury at the Government's request that the jury could not consider as racketeering acts any non-RICO offenses on which it found Petitioner not guilty. Although the jury found Petitioner guilty of two non-RICO counts, which charged the same conspiracy in violation of two different statutes, they constituted only one racketeering act under the terms of the indictment. Nevertheless, the jury found Petitioner guilty of the RICO offense, even though that offense, as the jury was instructed, required a finding that Petitioner committed at least *two* racketeering acts.

In setting aside the verdict, the district court noted that the RICO statute required the commission of two acts of racketeering and that the Government had chosen to charge the predicate acts the way it did and must suffer the consequences of an inartfully drafted indictment or failure of proof. (App. 180) The court also concluded that the Government's reliance on *Powell v. United States*, 469 U.S. 57 (1984), which upheld inconsistent jury verdicts, was misplaced because the RICO statute was a "special animal," with racketeering acts as "building blocks." The court concluded: "Without the right number of 'building blocks' in this case, it is impossible to build a RICO violation." (App. 181)

On the Government's subsequent appeal from the district court's order, the court of appeals reversed the order and reinstated the guilty verdict, holding that the issue was simply one of inconsistent verdicts, that *Powell* was controlling, and that no exception to this rule applied in RICO cases. (App. 24-31)

5. On Petitioner's appeal from the judgment of conviction on the remaining counts, he asserted that his conviction for participating in the affairs of an enterprise through collection of an unlawful debt – which a special jury verdict found to be a debt to one Joseph Dwek – was not supported by sufficient evidence. The court of appeals agreed. While it was clear that two of Petitioner's coindictees, Elias Saka and Sonny Brocco, collected an unlawful debt from Dwek, the court stated that evidence establishing Petitioner's "involvement in the Dwek affair was sparse" and the proof did not "establish that Vastola [petitioner] played a supervisory role in the transaction." (App. 35, 37) The court concluded that "the evidence is not sufficient that Vastola collected or attempted to collect an unlawful debt from Dwek," and ordered a judgment of acquittal on that count. (App. 37)

Petitioner also asserted that his conviction for the RICO conspiracy was infirm because, inter alia, there was no special verdict on this count indicating the unlawful debt or racketeering acts on which the jury had based its verdict. Petitioner argued that since a reviewing court could not be certain which of several grounds was relied upon by the jury in reaching its verdict and since the verdict could not be supported on some of the grounds, the verdict could not stand.

The court of appeals, however, concluded that the jury's verdict must have been based on a finding that Petitioner conspired to conduct the affairs of an enterprise through collection of an unlawful debt from Dwek, since the jury had found Petitioner guilty – albeit on insufficient evidence – of conducting the affairs of an enterprise through collection of an unlawful debt from Dwek. (App. 39) To reason otherwise, the court stated, would require it to assume that the jury returned inconsistent verdicts on the two charges. (App. 39) The court then concluded that there was sufficient evidence that Petitioner agreed to participate in the affairs of the enterprise through a collection of unlawful debt from Dwek, because Petitioner, although he did not know the details of the Dwek loan, "knew the loan was unlawful and with that knowledge, *encouraged* Saka to collect it." (App. 41; emphasis added.) The RICO conspiracy conviction was therfore affirmed.

## REASONS FOR GRANTING THE PETITION

1. The first question presented by Petitioner is identical with the issue already pending before the Court in *United States v. Rios*, No. 89-61, argued on February 28, 1990. Thus the issue is of obvious importance. It would therefore be appropriate for the Court to postpone consideration of this petition until *Rios* has been decided and then make summary disposition of the petition, with respect to the first question presented, in accordance with that decision.

2. The second question presented is similar to the issue pending in *Rios*, but raises serious additional concerns. An unexplained delay in sealing tape recordings requires suppression, even where no showing of tampering is made, because the statutory requirement that tapes be sealed immediately is a functional safeguard which contributes to the congressional purpose of minimizing the *risk* of tampering and because increasingly sophisticated technology shields altered tapes from detection. If the unexplained delayed sealing of tapes creates an unacceptable risk of tampering, which may be undetectable, the risk is even greater where the original tapes are released to a private individual. Since the tapes are no longer in the custody of the Government, their handling is not subject to oversight by either an assistant United States attorney or a Special Agent of the FBI. Thus the risk of undetectable tampering is appreciably greater. That is obviously why unsealing orders in this case directed that "the tapes shall be maintained in a secure place within the offices of the United States Attorney for the District of New Jersey" or that "after the tapes are unsealed, Special Agents of the Federal Bureau of Investigation at Newark, New Jersey, shall maintain custody of the tape recordings and protect them from editing or alteration."

Consequently, even if the Court were to conclude in *Rios* that an unexplained delay in sealing does not require suppression of tape recordings absent evidence of tampering, the same result should not obtain in cases where unsealing orders are violated by releasing original tapes to a private individual.

3. The third and fourth questions presented in this petition call on the Court to address the applicability of the holding in *Powell v. United States* to the unique circumstances of RICO trials. Such trials, of statutory necessity, require the jury to make intermediate findings – the defendant's commission of at least two racketeering acts – before making its ultimate finding – the defendant's participation in the affairs of an enterprise through a pattern of racketeering activity. Moreover, these trials are invariably complicated both factually and legally, and the juries must wrestle with complex indictments and difficult jury instructions. The risk that the jury's ultimate guilty verdict may be based on an insufficient or otherwise flawed premise is therefore far greater in RICO trials than in the ordinary criminal trial.

Consequently, where an inconsistency in the jury's overall verdict indicates that it misapprehended the law with respect to a RICO count of an indictment, and particularly where, as here, the inconsistency strongly suggests that the jury did not find all the essential elements of the RICO offense, then the *Powell* rule should not preclude a district court from remedying the problem.

Here the jury found Petitioner guilty on two non-RICO counts. However, because those counts charged the same conspiracy under two separate statutes, they constituted only one racketeering act under the terms of the indictment. In all reasonable likelihood, the jury misapprehended this aspect of the charge, and concluded that its finding of guilt on the two non-RICO counts satisfied the "two racketeering act" requirement for a RICO conviction. This is the only reasonable conclusion in light of the wording of the indictment and the judge's charge to

the jury, as the district court determined. "Conceivably," a word the court of appeals used advisedly (App. 25), there are other theoretically possible explanations, such as lenity or compromise. *See Powell*, 496 U.S. at 65. But such theoretical reasons are artificial under the circumstances of this and similar RICO cases. While theories of this sort could never be disproved to a mathematical certainty, they are simply unreasonable in cases such as this.

The Court should therefore grant certiorari on these questions to determine whether the *Powell* rule is properly applied in RICO cases to preclude a district judge from remedying a verdict which he or she reasonably concludes is based on a misapprehension of the law or on less than a finding that all the essential elements of the offense were established.

4. The fifth question presented is one of statutory construction as to which the circuits are in conflict, namely, whether, in order to be convicted of a RICO conspiracy, a person must agree to commit personally a predicate act or whether the person must merely agree to commission of the act. The court of appeals in this case followed *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.), *cert. denied*, 474 U.S. 971 (1985), which held that the defendant need not agree to commit the act personally. (App. 40) The Sixth, Seventh, Eighth, Ninth and Eleventh circuits agree. *United States v. Joseph*, 781 F.2d 549 (6th Cir. 1986); *United States v. Ster*, 858 F.2d 1241 (7th Cir. 1988); *United States v. Leisure*, 844 F.2d 1347 (8th Cir. 1988); *United States v. Brooklier*, 685 F.2d 1208 (9th Cir. 1982); *United States v. Carter*, 721 F.2d 1514 (11th Cir. 1984). The First and Second circuits disagree and require an agreement by the

defendant to commit the act personally. *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981); *United States v. Ruggiero*, 726 F.2d 913 (2d Cir. 1984).

This question, which would require the Court for the first time to determine definitively the essential elements of a RICO conspiracy, would also resolve a subsidiary question: whether a RICO conspiracy conviction may rest soley on a predicate act which is itself a conspiracy. Although the court of appeals did not expressly address this question, which had been answered in the negative by the district court (*see* App. 83-85), it affirmed Petitioner's RICO conspiracy conviction on the basis of a predicate conspiracy to collect an unlawful debt.

Because this is a matter of continued controversy and because the proliferation of RICO conspiracy prosecutions indicates that these questions will recur with increased frequency, the Court should grant certiorari to resolve the conflict in the circuits.

5. The sixth question presented in this petition, related to the fifth, asks the Court, to address the distinction, if any, between participating with others in the affairs of an enterprise through collection of an unlawful debt and conspiring with those others to participate in the affairs of the enterprise through collection of that debt and, second, to determine whether evidence legally insufficient to support the former can nevertheless be sufficient to support the latter.

The court of appeals held that there was insufficient evidence that Petitioner *participated* in the enterprise through collection or attempted collection of the debt from Dwek, and that the proof did not establish that

Petitioner played a supervisory role with respect to Saka and Brocco in the transaction. Nevertheless, the court concluded that Petitioner could be convicted of *conspiring to participate* in the affairs of the enterprise through collection of the unlawful debt from Dwek, because Petitioner, although he did not know the details of the Dwek loan, "knew the loan was unlawful and with that knowledge, *encouraged* Saka to collect it." (App. 41; emphasis added.)

To be guilty of the crime of conspiracy requires not only knowledge of the conspiracy's objective, but *participation* in the scheme. *Blumenthal v. United States*, 332 U.S. 539 (1949). If this is so, then the distinction between participating with others in the affairs of an enterprise through collection of an unlawful debt and conspiring with those others to participate in the affairs of the enterprise through collection of that debt is illusory. Consequently, there cannot be insufficient evidence of the former, but sufficient evidence of the latter. If Petitioner did not participate in the Dwek scheme, he could not have conspired to participate in it, because the conspiracy itself requires participation. In any event, knowledge of a conspiracy's objective and merely *encouraging* a member of the conspiracy to pursue that objective is not sufficient to make one a member of the conspiracy.

Since RICO indictments, as well as RICO civil complaints, now routinely allege RICO conspiracies under 18 U.S.C. § 1962(d) in addition to the RICO substantive violations under 18 U.S.C. § 1962(c), the Court should grant certiorari to determine the distinction, if any, between these subsections and the proof required for each.

6. The seventh and final question presented asks the Court to address whether, in light of *Powell v. United States*, 469 U.S. 57, it is correct to determine by pure speculation a proper basis for a jury's verdict on a particular count, avoiding, because they would be inconsistent with the jury's verdict on other counts, any bases that might be improper. In *Powell*, the Court characterized as "pure speculation" any assessment of the reason for an inconsistent verdict and disapproved of inquiries into the jury's deliberations. *Id.* at 66. Although determining the reason for a jury's inconsistent verdict is not quite the same as discovering a reason for a verdict that would not be inconsistent with the jury's other verdicts, both exercises call for some degree of speculation. Which calls for more speculation cannot be answered in the abstract. In this particular case, for example, the district court reasonably concluded in light of the terms of the indictment and the jury instructions, that the basis for the inconsistent verdicts was that the jury mistakenly believed they had found two racketeering acts when in fact they had found only one. The court of appeals' determination that the RICO conspiracy verdict was based on the Dwek loan because the jury had found Petitioner guilty on another count involving that loan relies solely on a presumption against inconsistent verdicts, and is less reliable than the district court's evaluation of all the circumstances. Consequently, the Court should grant certiorari to decide in what circumstances a court may determine the basis for a jury's verdict.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
April 5, 1990

Respectfully submitted,

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Filed: March 20, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 89-5372, 89-5383, 89-5510

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UNITED STATES of America,
Appellee at Nos. 89-5372/5383,
Appellant at No. 89-5510

v.

GAETANO VASTOLA, Appellant at No. 89-5372,
Appellee at No. 89-5510

v.

ELIAS SAKA, Appellant at No. 89-5383

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On Appeal from the United States
District Court for the
District of New Jersey
(D.N.J. Criminal No. 86-301)

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Argued February 6, 1990

BEFORE: GREENBERG, SCIRICA, and
SEITZ, *Circuit Judges*

(Filed March 20, 1990)

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OPINION OF THE COURT

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GREENBERG, *Circuit Judge.*

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## I. INTRODUCTION

Gaetano Vastola and Elias Saka appeal to this court from final judgments of conviction and sentence entered by the United States District Court for the District of New Jersey on May 3, 1989, following a jury trial in which they were found guilty of two substantive RICO offenses under 18 U.S.C. § 1962(c), a RICO conspiracy offense under 18 U.S.C. § 1962(d), and a conspiracy to use extortionate means to collect an extension of credit, in violation of 18 U.S.C. § 894. In addition, Saka was found guilty of various other extortion offenses and of mail and wire bankruptcy and insurance fraud. The United States, pursuant

to 18 U.S.C. § 3731, appeals from an order of the district court, entered on April 28, 1989, granting Vastola's post-conviction motion for a judgment of acquittal on one of the two substantive RICO counts.

Appellants originally were indicted along with nineteen other defendants in a 114 count indictment charging a variety of crimes. By opinion and order dated September 1, 1987, the district court severed the case for separate trials. *United States v. Vastola*, 670 F. Supp. 1244, 1261 (D.N.J. 1987). Vastola and Saka ultimately were tried on a twenty-six count redacted superseding indictment, filed on February 23, 1989, which named Saka in twenty-five counts and Vastola in fourteen. Both appellants were sentenced to total prison terms of twenty years and, in addition, Vastola was ordered to pay fines totalling $70,000 and Saka was ordered to pay fines totalling $185,000.

On appeal, Vastola contests the sufficiency of the evidence to support his convictions for the extortionate collection conspiracy charged in Counts 4 and 9 of the superseding indictment, and the substantive RICO offense charged in Count 2. He also asserts various grounds for reversal of his RICO conspiracy conviction under Count 3, including an alleged defect in the jury instructions and insufficiency of the evidence of his involvement in the predicate acts underlying the conspiracy. Finally, he raises various challenges to the conduct of the trial itself, arguing, in part, that he suffered irreparable prejudice because of the government's denomination of the criminal enterprise as the Vastola Organization, and because of the district court's admission of expert testimony

regarding the meaning of loansharking terms used by appellants.

Saka argues that the district court erred as a matter of law when it denied his pretrial motion to suppress tape recordings from the government's electronic surveillance of appellants' communications, on the ground that the government violated the Wiretap Act, 18 U.S.C. § 2510 et seq., when it relinquished custody of the tapes to a private party for enhancement. He also maintains that the district court abused its discretion when it denied his pretrial motion for appointment of new counsel and when it refused to suppress certain evidence seized pursuant to overbroad search warrants.

Finally, the government, in its appeal of the district court's grant of judgment of acquittal for Vastola on Count 1 of the superseding indictment, has advanced the legal question of whether the RICO conviction may stand, notwithstanding Vastola's acquittal of separately charged offenses making up three of the four predicate racketeering acts charged in the indictment.

We have considered the arguments raised by Vastola and Saka to the extent that they relate to both appeals, as Vastola and Saka have adopted each others' arguments pursuant to Fed. R. App. P. 28(i). Based on our review of the record, we agree with Vastola that there was insufficient evidence to support his RICO conviction under Count 2, and will reverse the district court's order entering judgment of conviction and sentence on that count. We also have determined that the district court erred as a matter of law in granting Vastola's motion for judgment of acquittal on Count 1, and therefore will reverse the

order challenged in the government's appeal and remand Vastola's case for entry of judgment of conviction on Count 1 and for resentencing. In all other respects, under the applicable standards of review, we see no basis to disturb the district court's order with respect to Vastola, and will affirm his convictions on Counts 3, 4, and 9 of the superseding indictment. We will affirm Saka's convictions on all counts.

## II. THE FACTS

The prosecution's theory, as reflected in its opening statement, was that Vastola headed a "secret criminal enterprise," the "Vastola Organization," which "encouraged, aided and profited from" the illegal activities of its members. Ranking members of the enterprise were alleged to include Saka, "who came up with most of the fraudulent schemes the organization profited from" and Vastola's cousin, Palmer ("Sonny") Brocco, who carried out Vastola's orders. The enterprise was headquartered at the Video Warehouse in Monmouth County, New Jersey.

The indictment attributed various crimes to the enterprise, including a conspiracy to use and use of extortionate means to collect an extension of credit to John LaMonte in connection with a record purchase from MCA Records, Inc., numerous usurious loans, "bust-out" schemes to defraud suppliers to businesses controlled by the enterprise, and insurance and bankruptcy frauds. We will set forth the circumstances of only the two of these crimes necessary to our discussion.

### *1. The Dwek Loan*

Dwek was an executive at Chams Clothing Company. He testified that when he left the company, he negotiated a financial settlement which ultimately yielded him $40,000 in return for his relinquishment of certain contract rights. When that money was not immediately forthcoming, he began to experience "financial difficulty." A friend of his, Ralph Setton, put him in contact with Saka.

Saka and Dwek met in February, 1985 to discuss Dwek's prospects for obtaining a loan. Saka told Dwek that he could deliver $10,000 in cash within a day which would be payable at an interest rate of $250 per week. They consummated the deal in a subsequent meeting, at which Sonny Brocco gave Dwek $10,000 in cash. The debt was evidenced by a promissory note which did not contain any interest rate terms.

Dwek testified that he regularly paid the interest on his loan at the Video Warehouse and would give the money to whoever was present, normally, Saka. Sonny Brocco or Nick Massano. However, he understood Saka to be the obligee. When Dwek's settlement from Cham Clothing was further delayed, he borrowed an additional $5,000 from Saka at an interest rate of $125 per week. Dwek further testified that he saw Vastola at the Video Warehouse about two or three times over a six month period and knew him to be Saka's landlord.

Around this time, Dwek also entered a partnership with Saka to market a perfume developed by a clothing company called Jou Jou. They agreed to become equal partners, with Saka supplying the financing and Dwek, the business expertise. Although Saka and Dwek did not

go far in this venture because the "monetary funds" were unavailable, they did form a small corporation for the purpose of effectuating the Jou Jou deal and Saka attempted to flesh out the details of how the profits would be allocated.[1]

In any event, Dwek soon fell behind on his interest payments. In a telephone conversation on May 7, 1985, Brocco did not mince words on the subject of Dwek's lateness:

> I don't appreciate get'n fucked around by you! Ya know what I mean, you said 10:30. You know what time it is now? And you been jerk'n me off for two weeks. Now how do you want to handle

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[1] On July 3, 1985, Saka, in a conversation with an individual identified in the transcript as an "unknown male," stated:

> So now what we're supposed to do is go fifty fifty with Dwek. But now what we're talking about with Dwek we ain't gonna do that, we're gonna tell Dwek listen, you get a third, I get a third, they get a third. That's the way we should do it. Or may give them forty percent, but we want control. . . .

Appendix at 3555.

Saka went on to discuss the level of "salary" which would be paid Dwek, and mentioned that he and Sonny had been contemplating paying Dwek $500 per week, to which the unknown male responded, "(UI) the five, we gonna pay him five hundred a week?" Saka explained that the salary was "part of our expenses."

In summation, the government argued that the unknown male was Vastola and that the subject of the conversation was the unlawful loan to Dwek. From the context, however, it would seem that Saka was referring to his partnership with Dwek on the Jou Jou perfume deal.

> this? Do you want me to come over there and strangle you, is that what you want?

Appendix at 3244.
Dwek understandably replied, "No Sonny." *Id.*

On April 22, 1985, Saka and Brocco assessed the status of Dwek's debt. Saka reminded Brocco that Brocco had given Dwek $10,000 and that Saka had later given him $5,000. They concluded that Dwek owed them $15,000 plus the "juice," and that, of the principal, Brocco was entitled to $2,500. According to the government, Saka then pointed out, "I never squared you with Tommy [Vastola]."[2]

The subject of Dwek's debt also came up in a conversation among Vastola, Saka and Brocco on April 26, 1985. After discussing various other loans, Vastola asked Saka, "what happened with that guy that had the problem with that guy that, uh, remember we met him here?" Saka explained the difficulties Dwek was experiencing in reaching a settlement with Chams Clothing and Vastola, referring to Dwek's former partners at Chams asked if they had gotten "a piece." Brocco then informed Vastola that when Dwek reached a settlement, "they" were going to lay claim to at least part of it. Vastola responded, "Take a piece (UI) give up a little bit, if it wasn't on account of

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[2] Although this statement appears in the transcript, Vastola claims that it is not on the tape. In its answering brief, the government never directly asserts that the statement is on the tape but instead, argues that Vastola waived any objections to the transcript because he failed to raise them at trial.

you people. He would have gotten nothing."[3] Brocco questioned whether they had a claim to Dwek's settlement and Saka asserted that "it doesn't hurt to ask. All's he can say is no." To this Vastola argued. "Tell him, he's gotta put somethin' in the side. After all you came here for backup, you had the backup if there had been a problem. . . .So now you settled."

Dwek settled with Cham Clothing in April, 1985 and paid the $10,000 loan off in one lump sum payment. He paid off the $5,000 loan in September, 1985.

### 2. *The MCA Deal*

In early 1984, MCA Records, a Los Angeles based corporation, agreed to sell several million "cut-out" records and tapes,[4] valued at approximately $1,750,000, to Salvatore Pisello, an individual connected with Consultants for World Records, Inc. The only document evidencing the transaction was a purchase order from Roulette Records, the guarantor of the sale price. Roulette Records was owned by Morris Levy who was identified in the indictment as Vastola's and Saka's co-conspirator. Although there was no written agreement between MCA and Pisello, MCA officials understood Pisello to be the buyer in the transaction.

Pisello and Levy approached Vastola to find a buyer for the records and Vastola recommended John LaMonte, who owned a record distribution company called Out of

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[3] "UI" refers to unintelligible.

[4] "Cut-out" is an industry term for obsolete merchandise. Appendix at 853.

the Past, Ltd. LaMonte had served time in a federal penitentiary with Vastola's cousin, Palmer ("Sonny") Brocco, and apparently Brocco suggested LaMonte to Vastola because he owed LaMonte a favor.

Pisello accepted LaMonte as buyer and the deal was consummated in the summer of 1984, when MCA shipped the records, at Roulette's request, to Betaco Enterprises in Brentwood, California, a customer of Pisello, and to LaMonte's company, Out of the Past, Ltd., in Darby, Pennsylvania. In 1984, MCA received sporadic payments for the records shipped to Pennsylvania from Pisello's company, Consultants for World Records, Inc., but no payments were forthcoming from January 1985 on. At that time, the balance due was approximately $800,000. MCA then looked to Roulette Records as the guarantor and eventually asked Pisello for assistance in securing the return of the merchandise. Out of the Past sent back a substantial number of records in mid-1985, leaving an outstanding balance of approximately $350,000.

MCA's Chief Financial Officer, Daniel McGill, then repeatedly telephoned Morris Levy and his associate, Howard Fisher, demanding payment of the remainder of the debt. As a result of those conversations, MCA received two additional checks, a check for $125,000 dated October 9, 1985, and a check for $120,000 dated January 29, 1986. The remaining balance of $100,000 was never paid to MCA.

The deal unravelled because LaMonte had failed to pay for the merchandise he received from MCA. LaMonte was expected to pay for the merchandise itself plus

$300,000 in profits, which was to be divided equally among Pisello, Levy and Vastola as partners in the transaction.[5] LaMonte paid about $30,000 in cash. The remainder of his payments were in notes, most of which bounced.

As Vastola's and Levy's frustration with LaMonte mounted, they, along with Saka and Brocco, began formulating plans to recover either the balance due them or the

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[5] On appeal, Vastola strenuously denies that he was partners with Pisello and Levy and insists that he was aligned with LaMonte. Although the record is somewhat unclear as to whether Vastola was involved in the early stages of the deal, there is considerable support for the government's proposition that Vastola formed a partnership with Levy and Pisello, at least as of the time that LaMonte was brought into the deal. In an argument between Vastola and Levy over Vastola's entitlement to a percentage of profits derived from a sale made before the delivery to LaMonte, the following exchange took place:

> VASTOLA: So we're, we're only partners with the, with the losses and not the wins?
>
> LEVY: You weren't a partner on that first part of the load.
>
> VASTOLA: Why not?
>
> LEVY: Because you weren't. You came in with John [LaMonte]. You came in with John and, and . . .
>
> VASTOLA: I was in with me, you and him and your partner before John got in. Me, you and him and your partner was in with that six million records, we'll cut it up three ways.

Appendix at 3751-52.

merchandise. At the same time, Levy, with recurring frequency, blamed Vastola for bringing LaMonte into the deal and exerted pressure on him to get LaMonte to pay.

On December 18, 1984, Vastola instructed his cousin Brocco to get hold of LaMonte because "every fuckin' body is screamin' over those fuckin' payments, the notes, and that. . . ." He added that Levy and his associates were holding Brocco responsible for LaMonte's conduct because he had assisted LaMonte in negotiating the deal and that "[t]hey want[ed] [Brocco] to sit in the fuckin' joint, [LaMonte's warehouse] there and don't make a record go in and out until this money's paid." Later that day, when Fisher called Video Warehouse, Saka assured him that he, Brocco, and Vastola intended to visit LaMonte, and that Vastola planned to "read [LaMonte] the riot act."

The following day, Vastola told Saka that he planned to install Brocco in LaMonte's business to ensure that no merchandise or money was removed before Levy was paid: "the money's got to be taken and sent to Morris [Levy]. I don't care what [LaMonte's] business is."

On January 10, 1985, Brocco informed Vastola that LaMonte had disclaimed responsibility for any debt to MCA on the ground that he was liable only to World Wide Consultants.[6] Vastola responded: "[T]his guy is aggravating me, you know. . . . I tell you the truth he had me at a stage last night, I'll tell you the truth, that if I had

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[6] The transcript refers to "World Wide Consultants." Given the similarity in names, we believe that the reference is to Pisello's company, "Consultants for World Records, Inc."

him in front of me I would have broke his ass." Less than two hours later, Vastola again called Brocco and instructed him to drive to LaMonte's company and pick up a check for $629,000. He added that if LaMonte failed to cooperate, he would "put him in a fuckin' hospital."

Vastola called Brocco again on January 10, 1985, and reiterated his demand that Brocco pick up the check for $629,000 from LaMonte. Apparently, Pisello was in town and had delayed his return trip to California until he received payment from LaMonte. Vastola, pressured by Pisello, again expressed his exasperation with LaMonte and indicated that he was practically resolved in turn LaMonte over to his partners so that they could attempt collection from him: "[I]t's going to come to the point I'm gonna tell Rudy, ah . . . Sal [Pisello], everybody, go over there, do whatever you want." Apparently, Brocco was unable to obtain the check from LaMonte.

At some point in the ensuing month, LaMonte sent notes worth $300,000 to Pisello and Levy in partial payment of his debt. Unfortunately, the notes bounced and Pisello and Levy had to pay the banks $90,000 to cover them. On February 13, 1985, Vastola complained to Saka that he probably would be held responsible for $30,000 of the bank charge, because it was "a three way partnership, it's 30, 30, 30." He further opined that the situation with LaMonte was becoming so disastrous that it might become necessary "to put two guys there to control [LaMonte's] whole business." Saka agreed, and suggested that they might be doing LaMonte a favor because his business judgment was so poor.

Over the ensuing months, Vastola, Saka, and Levy repeatedly discussed the possibility of seizing control of LaMonte's business to satisfy his debt. On April 8, 1985, Vastola, Saka and Levy had a three-way conversation in which they considered whether LaMonte could repay the debt at a rate of $30,000 per week. Levy believed that LaMonte had money "coming in by the thousands" and that he could meet that payment schedule. On the subject of Brocco's apparent inability to get LaMonte to pay, Saka suggested that Brocco felt a certain amount of loyalty to LaMonte. Vastola responded: "He can't have an obligation to him over me. . . . His first obligation is here."

In May, 1985, during the course of a meeting between Vastola, Brocco, Saka and LaMonte, Vastola punched LaMonte in the nose, causing him to spend at least four days in a hospital. Vastola and Saka agreed that LaMonte deserved to be punched because he had gotten "totally out of line." Later, referring to the incident, Saka said to Levy and Vastola that he could not understand how after Vastola "busted his jaw" LaMonte "still [had] the balls not to come up with the money."[7]

On September 23, 1985, a two hour meeting, attended by Vastola, Saka, Levy, Fisher, and Dominick Canterino took place at Roulette's Manhattan offices.[8] The primary

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[7] It appears that LaMonte's period of active cooperation with the government began during his hospitalization, as LaMonte became an informant on May 18, 1985.

[8] Canterio, Levy and Fisher were charged in the original indictment filed in this case and, following a joint trial, were found guilty under 18 U.S.C. § 894 of an extortionate collection

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topic of conversation was LaMonte's debt. After considerable haggling over who was responsible for LaMonte's behavior, the parties agreed to make LaMonte ship the records back to MCA the following Friday:

> CANTERINO: How do we resolve this now?
>
> VASTOLA: All right we're resolving it this way if it's all right with everybody. We're going over there Friday morning, we're gonna make him ship back all the stuff that . . .
>
> SAKA: Two hundred forty four thousand.
>
> LEVY: Even a little more.
>
> SAKA: Let's ship back four hundred.

Appendix at 3845.

Later, when Canterino asked Vastola whether he felt that LaMonte was a "controllable guy," Vastola assured him. "It's gone, it's gone."

On October 3, 1985, Vastola told Fisher that LaMonte and his family had disappeared. He had "people knockin' on his windows" but they had seen no sign of the LaMontes.

## III. DISCUSSION

### A. GOVERNMENTS APPEAL

#### *1. Jurisdiction*

The threshold question with respect to the government's appeal is jurisdictional, as Vastola has moved to

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conspiracy in connection with the MCA deal. The district court granted Fisher's motion for judgment of acquittal but sustained Canterino's and Levy's convictions. *United States v. Levy*, 694 F. Supp. 1136 (D.N.J. 1988). This court affirmed by judgment order dated December 6, 1989.

dismiss the appeal because of the government's failure to file its notice of appeal within thirty days of the district court's order granting Vastola's motion for judgment of acquittal on Count 1.[9] *See* Fed. R. App. P. 4(b).[10]

On April 28, 1989, the district court orally announced its decision on Vastola's motion and entered its order granting it that same day. Apparently, there was some confusion in the United States Attorney's office and within the district court's chambers as to whether the order actually was entered on April 28, 1989, because, following inquiries made by Assistant United States Attorney Repetto, the district court on May 30, 1989, issued a second order, entered on June 1, 1989, granting the judgment of acquittal. The government's notice of appeal, filed on June 12, 1989, recited that the government was appealing from the order entered on June 1, 1989.

As Vastola correctly points out in his motion to dismiss, the timeliness of the government's notice of appeal must be determined either from the date of the April 28,

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[9] The parties agree that we have jurisdiction over Vastola's and Saka's appeals under 28 U.S.C. § 1291 and that, apart from the dispute regarding the timeliness of the government's notice of appeal, we have jurisdiction over the government's appeal under 18 U.S.C. § 3731 and 28 U.S.C. § 1291.

[10] Rule 4(b) provides:

> When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant.

Fed. R. App. P. 4(b).

1989, order or the date of Saka's notice of appeal, as that was the last notice of appeal filed by "any defendant." Rule 4(b)(ii). The district court's entry of the second order on June 1, 1989, could not, in itself, extend the time for the filing of the notice of appeal because the order entered on April 28, 1989, was not vacated by that order, or insofar as we are aware, by any other order. As Saka's notice of appeal was filed on May 8, 1989, the latest the government could have timely filed its notice of appeal was June 7, 1989. Therefore, barring any time extensions, the government's notice of appeal was filed five days late.

However, by letter dated October 18, 1989, the government moved for a postponement of this court's decision on the motion to dismiss, as the government was seeking an extension of time of the notice period from the district court pursuant to Rule 4(b). The postponement was allowed and the district court initially denied the government's motion by order dated November 13, 1989, but, pursuant to the government's motion for reconsideration, by order dated December 5, 1989, granted the extension of time on the ground of excusable neglect.

The issue before us is whether the district court retained subject matter jurisdiction to grant a time extension for the government's filing of a notice of appeal. We conclude that it did and therefore deny the motion to dismiss the government's appeal.

An appellate court cannot enlarge the time for an appeal because the absence of timely notice deprives it of subject matter jurisdiction. *United States v. Robinson*, 361 U.S. 220, 224, 80 S.Ct. 282, 285 (1960); *United States v.*

*Grana*, 864 F.2d 312, 314 (3d Cir. 1989); *Braden v. University of Pittsburgh*, 552 F.2d 948, 950-51 (3d Cir. 1977). However, in limited circumstances, the district court can extend the period for filing of a notice of appeal. Fed. R. App. P. 4(b) provides that:

> Upon a showing of excusable neglect the district court may, *before or after the time has expired*, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. [Emphasis supplied.]

Several courts of appeals have construed this provision to mean that, in criminal cases, a notice of appeal filed within thirty days after the expiration of the filing period functions as a request for an extension of time, which may be granted retroactively by the district court after the expiration of the thirty day extension period. *See e.g., United States v. Rothseiden*, 680 F.2d 96, 98 (11th Cir. 1982) ("The practice under FRAP 4(b) is that if the untimely notice of appeal is filed within the extended 30-day period, then we will consider the filing as a motion made to the district court for extension of time for excusable neglect."). *See also United States v. Kaden*, 819 F.2d 813, 817 (7th Cir. 1987); *United States v. Golding*, 739 F.2d 183 (5th Cir. 1984).

We have yet to adopt this construction of Rule 4(b) followed by our colleagues on the Courts of Appeals for the Fifth, Seventh and Eleventh Circuits. *But see United States v. McKnight*, 593 F.2d 230, 233 (3d Cir. 1979) (dismissing appeal without prejudice where notice of appeal was untimely under Rule 4(a) but was filed before the expiration of the thirty day time period for a finding of

excusable neglect because the court of appeals lacked the power to remand the matter to the district court). Vastola has interpreted our decision in *United States v. Grana*, 864 F.2d at 312, to mean that we have expressly rejected the proposition that a district court retains the power to grant a time extension under Rule 4(b) after the expiration of extended thirty day filing period. However, *Grana* is inapposite to the situation here, as our decision in that case did not hinge on our construction of the time extension provision in Rule 4(b).

In *Grana*, the appellant, an inmate at a federal prison, filed a notice of appeal from a final order entered April 18, 1988, on May 13, 1988, fifteen days after the appeal period expired. 864 F.2d at 314. The appellant claimed that he had not received the district court's order until May 5, 1988, due to negligence on the part of prison personnel. *Id.* Relying on *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379 (1988), wherein the Supreme Court held that the timeliness of a *pro se* inmate's notice of appeal must be judged from time of its delivery to prison authorities rather than from the time of its filing, we held that the notice of appeal was timely if filed within ten days of the inmate's receipt of the district court's final order. *Id.* at 316. We reasoned that prison delays in transmitting a final order to an inmate are just as destructive of inmate's rights as are delays in filing his papers in court. *Id.* Accordingly, we remanded to the district court for a factual finding as to the date the inmate received the order. The decision in *Grana* thus rested on very different principles than *Kaden*, *Rothseiden*, and *Golding*.[11]

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[11] In fact, in *Grana*, we expressly stated that we were not relying on the extension provisions of Rule 4(b). The inmate in

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Vastola also argues that the construction of Rule 4(b) urged by the government indefinitely continues the district court's jurisdiction to rehabilitate untimely notices of appeal. We reject this argument, as Rule 4(b) contains an inherent limitation on the district court's ability to grant a time extension. Although on its face, Rule 4(b) confers indefinite jurisdiction on the district court to grant a time extension, if no notice of appeal has been filed within the thirty day extension period, then the district court's order would have no force or effect, as the court can only extend the filing period for thirty days. The key question under Rule 4(b) is when the notice of appeal was filed, not when the time extension was granted.[12]

We have no doubt that the courts in *Kaden*, *Rothseiden*, and *Golding* were correct in recognizing the power of a district court to grant a time extension in a criminal case after the expiration of the extended notice period, as their construction of Rule 4(b) is consistent

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*Grana*, in seeking to obtain immediate appellate review, pointed out that as of May 5, 1988, when he received notice of the final order, he still could have filed a motion for a time extension under Rule 4(b). *Id.* at 314 n.6. We declined to rely on the "procedural avenues for attaining appellate review" by extension of the time to appeal provided in Rule 4(b) because they are "subject to district court discretion and therefore do not compensate for the right to appeal which is lost due to prison delay." *Id.*

[12] Vastola's final argument, that the so-called "legal fiction" proposed by the government should apply only to appeals by defendants, does not require extensive discussion, as it is contrary to the literal language of Rule 4(b), which treats appeals by defendants and the government equally.

with its literal language, which authorizes a district court to make a finding of excusable neglect "before or after the time has expired." In view of the district court's unchallenged finding of excusable neglect, we conclude that the government's notice of appeal filed June 12, 1989, from the order of April 28, 1989, was timely within the thirty day extension period. Accordingly, we deny Vastola's motion to dismiss the government's appeal.

2. Inconsistency of the Verdict on Count 1

The district court granted Vastola's motion for judgment of acquittal with regard to Count 1 of the superseding indictment, which charged him with conducting an enterprise through a pattern of racketeering in violation of RICO, 18 U.S.C. § 1962(c). Count 1 alleged four predicate acts of racketeering, each of which was defined through reference to various substantive offenses charged in separate counts of the indictment. The first racketeering act was Vastola's participation in a conspiracy to use and use of extortionate means to collect the extension of credit to John Lamonte in connection with the MCA deal, as charged in Counts 4, 5, 9, and 10. The second was Vastola's involvement in a conspiracy to make extortionate loans and to use extortionate means to collect them, as charged in Counts 6 and 7. The third racketeering act concerned a particular extortionate loan to Daniel Zack, as charged in Count 11. And the fourth was his fraudulent concealment and transfer of property of Dispodype, Inc., a company controlled by Saka, in violation of the bankruptcy laws, as charged in Counts 24 and 26. Although the jury either deadlocked or acquitted Vastola of all offenses underlying the four racketeering acts except

for those charged in Counts 4 and 9, it found him guilty of the RICO charge.

The district court granted Vastola's motion for judgment of acquittal, reasoning that the jury could not possibly have found a "pattern of racketeering activity" as required by section 1962(c), given that it found Vastola guilty on only one of the four predicate racketeering acts. According to the judge, the conviction on the RICO count was not simply a problem of inconsistency in the jury verdict. Rather, he decided that an essential element of the section 1962(c) offense was lacking, as that statute requires the government to prove at least two predicate acts of racketeering. We now reverse.

There is no question that the jury verdict was inconsistent. By its plain language, section 1962(c) requires the government to show a "pattern of racketeering activity," which, under section 1961(5), must be based on proof of "at least two acts of racketeering activity."[13] The jury's

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[13] Of course, bare proof of two racketeering acts is not sufficient to prove a "pattern" under the RICO statute. As this court explained in *Rose v. Bartle*, 871 F.2d 331 (3d Cir. 1989), the "crucial requirement to establish a pattern is 'continuity plus relationship . . . combin[ing] to produce a pattern,' " *Id.* at 364 (quoting *Sedima v. S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14, 105 S.Ct. 3275, 3285 n.14 (1985)). Thus, the predicate acts must be related in " 'purpose, results, participants, victims, or methods of commission . . . so as not to be isolated events.' " *Id.* (citations omitted).

There is no allegation in this case, however, that the predicate acts charged in the indictment, if proven would be insufficient to show a "pattern" under section 1961(5). Indeed, the first three acts would clearly constitute a pattern as they all involve extortionate activities.

acquittal or deadlock on the offenses underlying three of the four alleged racketeering acts was incompatible with its conviction on the RICO count. However, as the problem is purely one of inconsistency in the verdict, it is controlled by *United States v. Powell*, 469 U.S. 57, 105 S.Ct. 471 (1984).

In *Powell*, the defendant was acquitted of charges of conspiracy to possess and possession of cocaine with intent to distribute, but was convicted under 21 U.S.C. § 843(b) of using a telephone to facilitate the commission of the conspiracy and possession offenses. *Id.* at 59-60, 105 S.Ct. at 474. The Court of Appeals for the Ninth Circuit upheld the district court's grant of judgment of acquittal on the section 843(v) conviction, reasoning that an acquittal on the predicate felony, that is, the conspiracy, logically precluded a conviction on the compound felony of using a telephone to facilitate the conspiracy.

In a unanimous decision, the Supreme Court reversed, reaffirming its holding in *Dunn v. United States*, 284 U.S. 390, 52 S.Ct. 189 (1932)[14] that jury verdicts in

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[14] In *Dunn*, the defendant was convicted on maintaining a common law nuisance by keeping intoxicating liquor on his premises but was acquitted on charges of unlawful possession and sale of the liquor. The Court rejected the defendant's claim that the conviction should be set aside because of its inconsistency with the acquittals, reasoning that the defendant's argument unjustifiably assumed that acquittals were somehow more reliable than the conviction:

> 'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions,

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criminal cases cannot be set solely on the ground of inconsistency. As the Court explained the *Dunn rule applied with equal force to the facts in Powell* because it was impossible to tell whether the inconsistency favored the defendant or the government: "It is unclear whose ox has been gored." *Id.* at 65, 105 S.Ct. at 477. While it was possible that the jury did not find sufficient evidence to convict on the predicate offenses and misapplied the law on the compound offense, the converse was equally possible, namely that it was acquittals which were suspect. Given that the defendant's protection against double jeopardy precluded the government from seeking appellate review of the acquittals, the rule against overturning the conviction because of the inconsistency did "not necessarily . . . [create] a windfall to the Government at the defendant's expense." *Id.* at 65, 105 S.Ct. at 476. Conceivably, it was the defendant who enjoyed a windfall due to the jury's lenity.

The Court specifically rejected the defendant's argument that inconsistent verdicts in the compound felony context warrant an exception to the *Dunn* rule. The defendant maintained that an acquittal on the predicate offenses underlying a compound felony conviction necessarily means that there was insufficient evidence to prove the compound felony. *Id.* at 68, 105 S.Ct. at 478.

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> but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumptions of power which they had no right to exercise, but to which they were disposed through lenity.'

*Id.* at 393, 52 S.Ct. at 190.

According to the Court, the defendant's argument showed a

> misunderstand[ing of] the nature of the inconsistent verdict problem. Whether presented as an insufficient evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper-the one that the jury 'really meant.' This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent.

*Id.*

As this case virtually indistinguishable from *Powell*, we conclude that the inconsistent verdicts did not justify the district court's grant of judgment of acquittal. The jury was properly instructed that the government had to prove beyond a reasonable doubt *each* of the five essential elements of section 1962(c), including the defendant's participation in a "pattern of racketeering." Specifically with regard to the "pattern of racketeering" requirement, the district court made it clear that two predicate racketeering acts were required and that a guilty verdict on two substantive offenses would not be sufficient to establish a "pattern" if those offenses formed part of the same racketeering act described in Count 1 of the indictment:

> Paragraph 4 of Count 1 charges that defendant Gaetano Vastola committed 4 acts of racketeering. . . .You will find that a number of individual Racketeering Acts (Racketeering Act 1, 2 [and] 4 . . . ) are comprised of more than one count, thus a particular defendant is charged with more than one offense within the Racketeering Act. This is perfectly proper. However,

> I instruct you *in order to satisfy that Racketeering Act you must unanimously agree that the defendant . . . committed at least one of the offenses presented before you can find him guilty of that Racketeering Act.* Of course you may find that the defendant committed more than one of the offenses but a least one is essential and the finding must be unanimous. *The Government must prove beyond a reasonable doubt that each defendant committed, or knowingly and willfully aided or abetted in the commission of, at least two of the racketeering acts with which he is charged.*

Appendix at 2746 (emphasis supplied).

As the jury was properly instructed as to the RICO charge, we would be no more justified in holding that the jury disregarded those instructions than we would be in speculating that the jury disregarded the weight of the evidence when acquitting Vastola of the predicate offenses.

Notwithstanding the clarity of the jury charge, Vastola argues that a note sent out by the jury during its deliberations indicates that it was confused as to the difference between a "racketerring act" and the various offenses making up each of the four alleged acts. In its note, the jury wrote:

> We would like a legal instruction regarding the RICO counts. To some extent, all three RICO counts are discussed together in the same charge. We are not completely sure whether or not the 'two acts of racketeering activity' requirement applies to all three RICO counts or just to count 1. In other words, if we found one defendant not guilty of other *racketeering counts* (4-16, 18, 19, 21, 22, 24, 25 and 26) could we still find that defendant guilty on count 2 or count 3?

Appendix at 2885 (emphasis supplied).

According to Vastola, the jury's reference to "racketeering counts" indicates that "the jury considered *each* of the enumerated counts to be racketeering acts, despite the fact that County One encompassed only four racketeering acts." Thus, Vastola asserts, this case is unlike *Powell* because the court can rationally infer that the apparent inconsistency in the verdict was not a product of lenity but was attributable to the jury's erroneous belief that Vastola's guilt on counts 4 and 9 satisfied the two predicate act requirement for the section 1962(c) offense.

Although Vastola's interpretation of the note is plausible, it is not conclusive. It is equally possible that, by "racketeering counts," the jury meant to refer to the offenses subsumed in each of the four racketeering acts charged in Count 1. The note simply is too ambiguous to justify our speculation into the jury's thought processes. They only clear conclusion that can be drawn from the note is that the jury fully understood that it needed to find two predicate racketeering acts to convict under Count 1.

Vastola further suggests that, in the RICO context, acquittals on separately charged predicate offenses render a RICO conviction inherently suspect because, to assess guilt under the RICO statute, the jury first has to determine whether the defendant committed the individual offenses subsumed in the RICO charge.[15] In other

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[15] Vastola buttresses his argument by pointing to the following jury instruction:

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words, the predicate acts are "building blocks" which make up the pattern of racketeering activity, without which the jury could not make an intelligible decision as to the RICO charge. Accordingly, Vastola suggests, the problem here is not merely one of inconsistency in the jury verdict. Rather, the acquittals on the non-RICO counts indicate that the jury failed to find an essential

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> 2. *Consequences of Other Verdict*
> All of the racketeering acts charged in paragraph 4 of Count 1 relate to all but five of the Counts 4 through 26 of this indictment. If you find a defendant not guilty of one of those specific counts, you may not consider that count as one of the two racketeering acts required under Count 1.

Appendix at 2746.

Vastola argues that, under this instruction, the jury was required to consider the predicate acts before passing judgment on the RICO charge.

This argument is precluded by unequivocal language in *Powell* which negates the proposition that jury instructions regarding the interdependency of charges have any bearing on the inconsistent verdict problem:

> [The] problem is not altered when the trial court instructs the jury that it must find the defendant guilty of the predicate offense to convict on the substantive offense. Although such an instruction might indicate that the counts are no longer independent, if inconsistent verdicts are nevertheless reached those verdicts still are likely to be the result of mistake, or lenity, and therefore are subject to the *Dunn* rationale.

469 U.S. at 68, 105 S.Ct. at 478-79.

element of the RICO offense, namely, the pattern of racketeering activity.

We find this argument unpersuasive as it rests upon a fallacious assumption that the acquittals on the predicate acts can be treated as the functional equivalent of a special verdict on the RICO offense. While in some cases, we have inferred from acquittals on particular predicate offenses that the offenses were not the basis for the jury's general verdict of guilt on a RICO offense, *United States v. Riccobene*, 709 F.2d 214, 229 (3d Cir.), *cert. denied*, 464 U.S. 849, 104 S.Ct. 157 (1983), we have only done so where the only other possible conclusion would be that the jury returned inconsistent verdicts. That is, we will not assume an inconsistent verdict where an alternative explanation is present, namely, that the jury relied on alternative predicate acts when convicting on the RICO charge. Where, as here, the jury acquits on all but one of the separately charged predicate acts, we have no choice to conclude that the verdicts are inconsistent.[16] As such, the case is controlled by *Powell*.

Indeed, we point out that the situation here is virtually identical to the one in *Powell*. The offenses subject

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[16] Interestingly, this case demonstrates application of both the *Riccobene* and the *Powell* principles. As we will later discuss, under *Riccobene*, we can infer from the jury's special interrogatory on Count 2 the basis for its general verdict of guilt on Count 3, which charged Vastola with conspiring to conduct the affairs of the enterprise through the collection of unlawful debt. To reach any other conclusion, we would have to assume an inconsistency between the verdicts on Count 2 and 3, as they both relied on the same predicate acts.

to the inconsistent verdict in *Powell* also were interdependent, as the jury could not rationally find guilt on the section 843(b) offense without reaching some conclusion as to the defendant's involvement in the conspiracy. As in *Powell*, we have no way of knowing whether the jury convicted on the RICO count because if was convinced of Vastola's guilt on the predicate acts, yet, at the eleventh hour, acquitted him of those acts out of lenity or some other improper motivation. In view of the nature of the inconsistency in *Powell*, Vastola's attempt to distinguish that case must fail.

Finally, we note that other appellate courts have applied *Powell* in a RICO context. *See e.g. United States v. Tinsley*, 800 F.2d 448, 450-52 (4th Cir. 1986); *United States v. Neapolitan*, 791 F.2d 489, 505 (7th Cir.), *cert. denied*, 479 U.S. 940, 107 S.Ct. 422 (1986). *Cf. United States v. Chang An-Lo*, 851 F.2d 547, 560 (2d Cir.), *cert. denied*, ___ U.S. ___ 109 S.Ct. 493 (1988) (even assuming that conviction on predicate conspiracy was inconsistent with acquittal on RICO charge, reversal was not possible). We agree with our colleagues on the Courts of Appeals for the Second, Fourth, and Seventh Circuits that there is no legitimate basis for grafting an exception to *Powell* for RICO offenses.

We express no opinion as to whether the evidence of Vastola's participation in the predicate acts was sufficient to support his RICO conviction, as the sole basis for the grant of judgment of acquittal was the district court's erroneous conclusion that *Powell* did not apply to inconsistent verdicts in the RICO context. As the government acknowledged at oral argument, Vastola is free to appeal directly from the judgment of conviction and sentence on

Count 1 after its reinstatement by the district court. Of course, if he chooses to do so, he will be barred from rearguing any issues which were decided against him in this appeal. However, we do not decide any questions concerning the sufficiency of the evidence on Count 1 as they are not squarely before us at this time.[17]

In view of the foregoing, we will reverse the district court's grant of judgment of acquittal for Vastola on Count 1 and remand for reinstatement of the conviction and sentencing, without prejudice as to any other issues except those decided on this appeal pertaining to his conviction on that count.

## B. SUFFICIENCY OF THE EVIDENCE ON COUNT 2

Vastola maintains that there was insufficient evidence to support his conviction under section 1962(c) for conducting a criminal enterprise through the collection of unlawful debt, as charged in Court 2. The jury indicated

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[17] It might be argued that Vastola's challenge to the sufficiency of the evidence to support his RICO conspiracy conviction under Count 3 has placed in issue the sufficiency of the evidence with respect to Court 1, as the offense charged in Count 3 rested, in part, on the same pattern of racketeering activity charged in Count 1. However, in our review of Vastola's arguments raised with respect to Court 3, we have found it unnecessary to examine in detail the evidence regarding the pattern of racketeering activity, as we have determined that his RICO conspiracy conviction must stand on the basis of his involvement in the collection of an unlawful debt from Joseph Dwek. Furthermore, in our view, Vastola has not had a full and fair opportunity to frame the issues as they relate specifically to Count 1.

in a special interrogatory that the sole predicate act on which it based its verdict with regard to Vastola was his participation in the unlawful debt collection from Joseph Dwek. On appeal, Vastola does not challenge the sufficiency of the evidence to support the jury's finding of a criminal enterprise but has limited his argument to the circumstances surrounding the Dwek loan.

As an appellate court, we may not disturb a jury's factual findings if they are reasonably based on the record developed at trial. We must uphold the verdict if "the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt." *Burks v. United States*, 437 U.S. 1, 16, 98 S.Ct. 2141, 2150 (1978); *United States v. Leon*, 739 F.2d 885, 890 (3d Cir. 1984). Furthermore, as recently reaffirmed in *United States v. Sandini*, 888 F.2d 300 (3d Cir. 1989), the evidence " 'does not have to be inconsistent with every conclusion save that of guilt if it does establish a case from which a jury can find the defendant guilty beyond a reasonable doubt.' " *Id.* at 311 (quoting *United States v. Cooper*, 567 F.2d 252, 254 (3d Cir. 1977)). Vastola thus bears a heavy burden in convincing this court that the evidence was insufficient on Count 2. We believe that he has carried it.

To prove a RICO violation predicated upon a collection of unlawful debt, the government had to show that Vastola participated in the enterprise through the collection or attempted collection of a debt which was usurious

under state or federal law.[18] 18 U.S.C. § 1961(6)(A) (defining an "unlawful debt"). *See United States v. Pepe*, 747 F.2d 632, 674 (11th Cir. 1984) (upholding RICO convictions predicated upon attempted collection of unlawful debt). Here, there is no dispute that the loan to Dwek was usurious under New Jersey law, as the weekly interest charged on the loan corresponded to an annual interest rate of 130%. *See* N.J. Stat. Ann. § 2C:21-19 (West Supp. 1989). Vastola argues, however, that there was legally insufficient evidence linking him to the loan.

Although the evidence was overwhelming that Vastola supervised the collection of unlawful debts by his subordinates within the enterprise,[19] the evidence

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[18] It is noteworthy that section 1962(c) does not require proof of extortionate activity to establish a RICO violation predicated upon the "collection of unlawful debt." In this regard, the "unlawful debt" prong of section 1962(c) may be contrasted to the "pattern of racketeering" prong. If the government seeks to prove a RICO offense predicated upon a pattern of racketeering acts, it is confined to charging the predicate offenses included in section 1961(1). Of these offenses, the only ones which might arise out of the same transaction as a usurious loan are those chargeable under section 1961(1)(A), which brings within the purview of section 1962(c) "act[s] or threat[s] involving . . . extortion . . . chargeable under State law," and indictable offenses under 18 U.S.C. §§ 891-94 (relating to extorionate credit transactions) and under section 1951, the Hobbs Act. *See* section 1961(1)(B). All of the above offenses require a showing of extorionate activity.

[19] In a conversation on July 19, 1985, Jerry Gabonelli called Saka to inquire about the status of $5000 advance he had requested on a $20,000 loan. Saka explained that Vastola was out of town and that no money could be advanced until Vastola gave his approval:

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establishing Vastola's involvement in the Dwek affair was sparse. The government places heavy reliance on three tape-recorded conversations, the April 22, 1985, conversation in which Saka stated to Brocco, "I never squared you with Tommy," the April 26, 1985, conversation between Vastola, Saka, and Brocco in which Vastola urged Saka to take "a piece" of Dwek's settlement, and the July 3, 1985, conversation between Saka and the unknown male who the prosecutor, in his summation, claimed was Vastola.

Although the words, "I never squared you with Tommy" appear in the transcript, Vastola strenuously denies that the works are on the tape. The government in its brief never directly asserts that the words are on the tape but argues only that this court is bound to accept what it believes was the jury's factual finding that the words appear on the tape because Vastola's failure to object to the transcript at trial precludes him from challenging its accuracy in this appeal. We find it unnecessary to become embroiled in the parties' dispute over the accuracy of the transcript because, even if the transcript is accurate, the statement attributed to Saka would provide only tenuous

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SAKA: . . . Now if Tommy okays it you can have it. You know, as soon as he gets back, no problem.

GABONELLI: There is no possibility of me gettin'it, ah, today.

SAKA: No, because he's not here.

Appendix at 35-49-50.

support for a finding that Vastola supervised Saka's and Brocco's collection of the debt from Dwek.[20]

The second portion of the transcript cited by the government is Saka's conversation with the "unknown male" in which the unknown male, referring to Dwek, asked, " . . . we gonna pay him five hundred a week?" This statement provides no support whatsoever for the government's case. Given Saka's references to "go[ing] fifty fifty with Dwek" and to Dwek's prospective salary, it seems clear that the parties to the conversation were discussing Dwek's partnership with Saka on the Jou Jou deal rather than the debt. Therefore, even if the unknown male was Vastola, which is not beyond dispute, the conversation has no bearing on Vastola's guilt with respect to Count 2.

The only hard evidence linking Vastola to the Dwek loan is Vastola's conversation with Saka and Brocco on April 26, 1985, in which he urged them to "[t]ake a piece" of Dwek's settlement with Cham Clothing presumably to collect the unlawful debt. He further stated: "Tell him, he's gotta put somethin' on the side. After all you came here for backup, you had the backup if there had been a problem. . . .So now you settled." Arguably, this evidence, coupled with evidence of Vastola's involvement in other

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[20] It is of course true that Vastola's failure to object to the transcript at trial would have no bearing on our evaluation of the sufficiency of the evidence against him, because the transcript is not evidence. If the words do not appear on the tape, then a rational jury could not rely on them as evidence of Vastola's guilt.

loans, could be interpreted to mean that Vastola instructed Saka on how to proceed in collecting the debt. Also, it might be construed to mean that Vastola had authorized use of the criminal enterprise's resources, that is, the "backup," in the collection process.

However, the inferences which we might draw from these remakes are highly speculative. We further note that according to Dwek's own testimony, he recognized Vastola but had no direct dealings with him. Although we appreciate the fact that Vastola's lack of contact with Dwek is not dispositive, as the government's theory was that Vastola supervised the collection activities of Saka and Brocco, the remarks highlighted by the government do not establish that Vastola played a supervisory role in the transaction. Thus, even when viewed in a light most favorable to the government, the evidence is not legally sufficient to establish that Vastola collected or attempted to collect an unlawful debt from Dwek. In view of the paucity of the evidence against him, we must reverse Vastola's conviction on Count 2 and direct his acquittal on that count.

## C. THE RICO CONSPIRACY

In Count 3, the indictment charged Vastola and Saka with an agreement to conduct the affairs of the enterprise through a pattern of racketeering activity, as defined in Count 1, and through a collection of various unlawful debts enumerated in Count 2, in violation of section 1962(d). The jury indicated in a special interrogatory on Count 3 that it had based its verdict on both a pattern of racketeering activity and on the collection of unlawful

debt. On appeal, Vastola argues that his RICO conspiracy conviction must be set aside because the district court misinstructed the jury as to the pattern of racketeering requirement and because the evidence was legally insufficient to prove that he committed the predicate acts, under either of the government's theories.

The government argues that even if the evidence concerning the Dwek loan was insufficient to support Vastola's conviction on Count 2, it was sufficient to support his RICO conspiracy conviction under Count 3. Vastola, in turn, argues that even if the evidence proved his guilt of the Dwek collection, that alone could not sustain his RICO conspiracy conviction. He asserts that because the special interrogatory on Count 3 did not indicate which unlawful debt collection the jury relied upon in reaching its verdict, the court must find that the evidence was sufficient with respect to each alleged act. Thus, the threshold question before us is whether we can extrapolate from the jury's special interrogatory on Count 2 the basis for its verdict on Count 3. There is not question that we can.

It is true that a RICO conviction predicated upon multiple racketeering acts cannot stand where the evidence of any one of the underlying acts is legally insufficient and the court is unable to determine which act formed the basis for the conviction. *United States v. Brown*, 583 F.2d 659, 669 (3d Cir. 1978), *cert. denied*, 440 U.S. 909, 99 S.Ct. 1217 (1979). However, in *United States v. Riccobene*, 709 F.2d at 228, we held that there is no *Brown* problem when "the reviewing court can determine that the jury did not rely on the challenge predicated offense when reaching its verdict on the RICO charge."

*Riccobene* completely defeats Vastola's argument that the Dwek debt alone would be insufficient, as its facts are strikingly similar to the situation here. In that case, the defendant was acquitted of a gambling offense identified as one of several predicate racketeering acts supporting his RICO conspiracy conviction. Relying on *Brown*, he argued that his RICO conviction had to be reversed because the jury had delivered a general verdict which may have been based on the same evidence it discounted when acquitting him of the gambling charge. 709 F.2d at 229. In rejecting this argument, we explained that, to apply *Brown*, we would have to assume that the jury returned inconsistent verdicts on the two charges. *Id.* at 230. Rather than assuming that the jury acted irrationally, we decided that the acquittal "serve[d] a function analogous to a special interrogatory" and therefore, it precluded application of *Brown*. *Id.* at 229.

As in *Riccobene*, we would gave to infer inconsistent verdicts to look beyond the Dwek debt and therefore, if Vastola's RICO conspiracy conviction stands on the government's collection of unlawful debt theory, it must stand on the basis of the Dwek debt.[21] Although the evidence is insufficient to support Vastola's conviction of the substantive RICO offense charged in Count 2, that does not preclude a finding that he conspired to commit the offense.

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[21] The government need prove only predicate act to sustain a RICO conviction based on a collection of unlawful debt. *Cf. United States v. Pepe*, 747 F.2d at 673 (sustaining RICO conviction based on attempted collection of a single unlawful debt).

To prove a violation of section 1962(d), the government had to show that Vastola agreed to participate in the affairs of the enterprise through a collection of unlawful debt from Dwek. Mere assent to the commission of the predicate offense would be insufficient. 709 F.2d at 224. As explained in *Riccobene*, section 1962(d) criminalizes

> an agreement to 'conduct or participate . . . in the conduct of [an] enterprise's activities' through the commission of predicate offenses . . . , not an agreement to commit a pattern of racketeering activity alone.

709 F.2d at 224.

Thus, assuming proof of Vastola's agreement to the collection of the unlawful debt, that would only support his RICO conspiracy conviction if the collection offense was committed under the auspices of the enterprise. However, under *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.), *cert. denied*, 474 U.S. 971, 106 S.Ct. 336 (1985), Vastola did not have to agree to commit personally the predicate act to be guilty of a RICO conspiracy; it would be sufficient if he agreed to Saka's collection of the unlawful debt. *Id.*

Ironically, the most compelling evidence trying the Dwek loan to the enterprise is Vastola's own statement to Saka and Brocco that they were entitled to take "a piece" of Dwek's settlement because they "came *here* for backup." App. at 3386 (emphasis supplied). Although there is no evidence that the original extension of credit was funded by the enterprise, a jury reasonably could infer from Vastola's comment that the collection effort was one of the enterprise's unlawful endeavors. The fact that these remarks occurred in the context of what appears to

be general discussion about the status of various loans provides further support for an inference that the Dwek debt was tied to the enterprise.[22]

Although none of the statements attributed to Vastola indicates that he knew the details of the loan, a conspiracy conviction does not require proof that the defendant was aware of all aspects of the illegal activity. *See Riccobene*, 709 F.2d at 225. Furthermore, the government did not have to show that Vastola was a principal actor in the Dwek affair to prove his guilt on the RICO conspiracy charge. There is little question that Vastola knew the loan was unlawful and with that knowledge, encouraged Saka and Brocco to collect it. That is enough to establish Vastola's guilt on Count 3.

We conclude that a reasonable jury could find that collection of the debt from Dwek was an activity of the enterprise, rather than an independent venture on the part of Saka, and that Vastola conspired to further the enterprise through the collection. Accordingly, we affirm

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[22] Immediately preceding the discussion of the Dwek debt, the following exchange took place:

> BROCCO: Listen let's take a couple of prices like this here, see I would love to have 50,000 of them.
>
> VASTOLA: Rather take it ourselves. Take it ourselves Forget about.
>
> BROCCO: I told you, we have a situation like that you're always serious, you're always (UI).
>
> VASTOLA: Well, we need the scratch, that's all.
>
> Appendix at 3384.

Vastola's conviction under section 1962(d) on the basis of the government's collection of unlawful debt theory.[23]

## D. SUFFICIENCY OF THE EVIDENCE OF MCA EXTORTION

The evidence is overwhelming that Vastola conspired to use extortionate means to collect LaMonte's debt arising from the MCA deal, as charged in Counts 4 and 9. Indeed, these were the only non-RICO charges of which Vastola was convicted. Pointing to numerous intercepted conversations in which he was berated by Levy for failing to secure payment of the debt, Vastola argues that he was aligned with LaMonte as a buyer in the transaction. Although the relationship between Levy and Vastola clearly was not harmonious throughout the deal, it was Vastola himself who repeatedly insisted to Levy that he was an equal partner with Levy and Pisello in the deal. He cannot complain now that the jury recognized him as such.

Further, Vastola's contention that he enjoyed friendly relations with LaMonte is belied by his repeated assertions to his co-conspirators that LaMonte's continued physical well-being hinged on his speedy repayment of the extension of credit. While Vastola argues on appeal that his comments stemmed from his understandable frustration at LaMonte's irresponsible behavior, it was

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[23] In view of our decision with respect to the Dwek debt, we do not reach Vastola's challenge to the jury instructions on the pattern of racketeering requirement.

hardly unreasonable for the jury to draw a different inference, especially in view of evidence that Vastola punched LaMonte in the nose. Finally, the agreement to use extortionate means to collect the debt can be readily inferred from Vastola's remarks at the September 23 meeting concerned the seizure of LaMonte's business.

In short, we have no difficulty concluding that Vastola's convictions under 18 U.S.C. §§ 894 and 1951, as charged in counts 4 and 9, are supported by substantial evidence, as the evidence shows that he was so involved in the MCA extortionate collection conspiracy.

## E. NAMING OF THE RICO ENTERPRISE

Count 1 of the superseding indictment, which described the RICO enterprise, repeatedly referred to it as the "Vastola Organization." Also, in the course of his closing statement, the prosecutor identified the enterprise as the Vastola Organization.[24] The government, however,

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[24] In his summation, the prosecutor stated that:

> Vastola Organization, you haven't heard that in this case. You've only heard it when the indictment is described. You can't point to a group of people walking down the street and say, hey, man, there goes the Vastola Organization. There is no place that you can call where you say can I speak to the Vastola Organization. Nor do any of the participants refer to themselves as members of the organization. This is an organization that doesn't want to be known. It basically operates in secret.

Appendix at 2403.

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adduced no evidence that the RICO enterprise was denominated the "Vastola Organization" by its members or by any other persons.

Vastola's trial attorney objected to the government's use of the term, the "Vastola Organization," on at least two occasions, on February 8, 1989, following the charging conference and immediately following the court's charge to the jury. There is no indication that a contemporaneous objection was made to the closing summation. By letter memorandum to the district court following the charging conference, at which Vastola's attorney unsuccessfully moved to have the label be stricken from the indictment, the attorney wrote:

> We have asked that the Court strike from the indictment the highly prejudicial labeling of the alleged enterprise as 'the Vastola organization.' If, however, references to the 'Vastola organization' are not redacted from the indictment, we request that the jury be instructed . . . that they must 'take special care in considering the RICO charges not to be influenced by the government's *charge* that the alleged organization is the so-called 'Vastola organization. . . .'

App. at 2661 (emphasis in original).

This request was denied. Following the jury charge but before the jury retired, the attorney renewed his request

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The prosecutor also referred to the "Vastola Organization" in his opening statement. However, we will not set forth his comments herein because Vastola concedes that they were proper, as the prosecutor was entitled to attempt to prove the existence of an enterprise called the "Vastola Organization."

which again was denied by the district court on the ground that the jury already had been instructed that charges in an indictment do not constitute evidence. Members of the jury were given copies of the superseding indictment for use during their deliberations.

On appeal, Vastola argues that the district court abused its discretion in refusing to either redact the indictment or give the requested instruction and, as a result, he suffered manifest prejudice, particularly with regard to the RICO counts, which deprived him of a fair trial. The government in turn argues that the court had no power to redact the indictment and, in any event, the general instruction regarding the indictment's function as a charging instrument was sufficient to inform the jury that the label, the "Vastola Organization," was not evidence of Vastola's guilt. As explained below, we believe that Vastola has raised some very legitimate concerns. However, on the facts of this case, we find that there was no prejudice flowing from the denomination of the enterprise and therefore we shall not disturb Vastola's conviction of this ground.

As a threshold matter, if Vastola has a claim of unfair prejudice, it must be based solely on the language of the superseding indictment because his trial counsel failed to object to the prosecutor's use of the term in his closing statement. Absent a contemporaneous objection, the district court's failure to mitigate the prejudicial impact of the prosecutor's remarks must be evaluated under the plain error rule. *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046 (1985); *United States v. Sandini*, 888 F.2d at 308-09. Under the plain error rule, the prosecutor's allegedly improper references to the Vastola Organization

would serve as a basis for reversal only if, considering the "totality of evidence against the accused," the error was serious enough to deprive Vastola of a fair trial. *Sandini*, 888 F.2d at 309.

Of course, the court has no reason to perform a plain error analysis unless the appellant has pointed to an error. In his references to the closing statement, Vastola has not claimed any error on the part of the district court. He does not claim that the court *sua sponte* should have delivered curative instructions or taken other measures to remove the taint of the prosecutor's allegedly prejudicial remarks. In fact, the remarks were not necessarily unfairly prejudicial as the prosecutor conceded the absence of any evidence that the enterprise was named the "Vastola Organization." Accordingly, as there is no claim of error with respect to the summation and no compelling evidence of prejudice, we will only consider whether the district court erred in refusing to redact the superseding indictment[25] or deliver the requested instructions.

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[25] Contrary to the government's suggestion, the district court had the power to strike references in the indictment to the "Vastola Organization." Numerous decisions have specifically recognized the power of the district court to redact from an indictment charges which the government has resolved not to prosecute. *United States v. Zauber*, 857 F.2d 137, 150-51 (3d Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1340 (1989), and superfluous language which unfairly prejudices the accused. *United States v. Moya-Gomez*, 860 F.2d 706, 763 (7th Cir. 1988). *See also United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811 (1985) (deletions from an indictment do not necessarily constitute unconstitutional amendment(s). In fact, the district court in its pretrial decision, struck the preamble to the original indictment on the ground that it contained "irrelevant and vague language which may imply guilt by association or insinuate unalleged facts." 670 F. Supp. at 1255.

We are aware of no RICO cases in which the government, as part of its trial strategy, named the enterprise after one of the defendants. Several cases cited by Vastola involve situations where the enterprise was controlled by an organized crime family and was labelled by the family's surname. *See, e.g., United States v. Salerno*, 868 F.2d 524, 528 (2d Cir.), *cert. denied* ___ U.S. ___, 110 S.Ct. 56 (1989); *United States v. Daley*, 842 F.2d 1380 (2d Cir. 1988); *United States v. Scarfo*, 850 F.2d 1015 (3d Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 263 (1988). Vastola argues that in each of these cases, the government introduced evidence establishing the existence of a crime family bearing the name included in the indictment. *See Scarfo*, 850 F.2d at 1018 (testimony demonstrated hierarchy of control within the Scarfo crime family). However, to establish an enterprise under section 1962(c), the government would have had to introduce the type of evidence discussed in these cases, regardless of the label it affixed to the enterprise. Considering that, as members of organized crime families, the defendants in these cases hardly were in a position to complain that the enterprise shared their name, the cases simply have no bearing on the specific question before us.

The situation here is more closely analogous to cases where defendants have sought to have aliases struck from indictments or to have reference to them precluded at trial. *See, e.g., United States v. Moya-Gomez*, 860 F.2d at 762-63; *United States v. Jorge-Salon*, 734 F.2d 789, 791 (11th Cir.), *cert denied*, 469 U.S. 869, 105 S.Ct. 215 (1984); *United States v. Alfonso*, 552 F.2d 605, 618 (5th Cir.), *cert. denied*, 434 U.S. 857, 98 S.Ct. 179 (1977); *United States v. Persico*, 621 F. Supp. 842 (S.D.N.Y. 1985). In those cases, the courts

have held that the inclusion of an alias in an indictment, even one with strong negative connotations, is permissible if it is needed to connect the accused to the acts charged. *Persico*, 621 F. Supp. at 860-61. Still, as Vastola asserts, the government normally has been required to prove that the defendant was known by the alleged alias. *Id.*[26]

We recognize that in the RICO context, the government's naming of the enterprise after one of the defendants carries similar potential for prejudice as does identification of the defendant by a damaging alias. Of course, the risk of unfair prejudice is greatest where the defendant is only loosely affiliated with the enterprise. In such circumstances, the jury conceivably could infer an essential element of the RICO offense, namely, the defendant's participation in the enterprise, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 , 496, 105 S.Ct. 3275, 3285 (1985), from unsupported language in the indictment characterizing the defendant as the enterprise's leader. In such

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[26] *Persico* involved a RICO prosecution in which several defendants objected to the inclusion in the indictment of such aliases as "Frankie the Beast" and "The Snake." *Id.* at 860-61. The district court refused to redact the indictment before trial, reasoning that the aliases might be integral to the government's case, as the government had alleged that its primary evidence consisted of wiretap evidence in which the defendants referred to each other by their aliases. *Id.* ("Even if prejudicial, . . . aliases and nicknames are proper in an indictment where they will be part of the government's proof as trial.") The court stated, however, that, upon defendants' motion, it would consider redacting the indictment at the close of the government's case if the government failed to introduce proof of the aliases. *Id.*

cases, on a defendant's motion, it might very well be appropriate for the district court to either redact the indictment or deliver a specific instruction cautioning the jury not to consider the enterprise's name as evidence of guilt. *See Moya-Gomez*, 860 F.2d at 763.

However, we do not perceive this to be such a case. While the co-conspirators did not specifically refer to the enterprise as the "Vastola Organization," the record clearly shows that Vastola was in charge. It is evident that the majority of illegal loans issued by the enterprise were subject to Vastola's approval, and that the co-conspirators understood Saka and Brocco to be Vastola's "people." In fact, Vastola himself, in a conversation with Saka and Levy about Brocco's failure to secure payment from LaMonte, stated that Brocco's behavior called into question the strength of his allegiances to the organization and to Vastola.

On this record, we cannot see how the naming of the enterprise possibly could have influenced the outcome of this case. Had the indictment read, 'Vastola's organization,' no reasonable claim of prejudice could be made, as the government did prove the existence of an organization headed by Vastola. We cannot imagine that use of the practically identical phrase, the "Vastola Organization," conveyed anything to the jury that was not already amply demonstrated by the evidence. Thus, while the district court's safest course of action may have been to issue a cautionary instruction, its refusal to do so was at most harmless error.

## F. ADMISSIBILITY OF TESTIMONY REGARDING LOANSHARKING TERMS

The government called Sergeant Robert Jones, a law enforcement officer who participated in the electronic

surveillance of Video Warehouse and other locations, to identify voices on the government tapes and explain other details of the investigation. During the course of his testimony, over defense counsel's objections, he interpreted three tape-recorded statements as references to loansharking. First, he testified that Saka's statement, "I have three for you," meant that Saka had "three loan shark payments." Second, he interpreted Vastola's comment, "Everybody I okay to Rudy for money is fuckin' up cause they think they got me as a buffer. . . ." Jones explained that, given the context, "Okay meant that we okayed them to Rudolph Farone for a loanshark –," He was interrupted by an objection which was overruled. Finally, in reference to Brocco's and Vastola's remarks that they could "put it our for" two or three, Jones testified, "We could put it out for two. We could put it out for three. It's two points, two percent, terms used in loanshark loans."

The district court, relying on *United States v. Dicker*, 853 F.2d 1103 (3d Cir. 1988), and *United States v. De Peri*, 778 F.2d 963 (3d Cir. 1985), *cert. denied*, 475 U.S. 1110, 106 S.Ct. 1518 (1986), held that the above testimony was admissible under either Fed. R. Evid. 701[27] or 702.[28]. The

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[27] Rule 701 provides:

> If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue

[28] Rule 702 provides:

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court opined that Jones was qualified as an expert "in the fields relevant to this case" and that his opinions on the meaning of phrases used in the wiretap evidence would be helpful to the jury.

On appeal, Vastola argues that the district court erred in its evidentiary ruling because Jones was neither qualified, offered or admitted an expert on loansharking under Fed. R. Evid. 702 and his testimony went beyond scope of permissible lay opinion testimony under Rule 701. Vastola maintains that because " 'loansharking' was the gravamen of all the charges on which [he] was convicted," this improperly admitted testimony caused severe prejudice requiring reversal of his conviction on all counts. We disagree.

In *De Peri*, this court held that a police officer's explanation of cryptic remarks made in tape-recorded conversations between himself and the defendant were admissible under Rule 701 because it was rationally based on his perception of the conversation and helpful to the trier of fact. 778 F.2d at 977. The court noted:

> Martin's language on the tapes is sharp and abbreviated, composed with unfinished sentences and punctuated with ambiguous references to events that are clear only to Martin and

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> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

> his audience. To the uninitiated listener, Martin speaks as if he were using code.

*Id.*

In *Dicker*, we explained that *De Peri* did not authorize the admission of all opinion testimony regarding the substance of recorded conversations. Such testimony is admissible only to assist in the jury's interpretation of coded portions of the conversations. 853 F.2d at 1109. Where the statements are clear, such opinion testimony is not helpful to the trier of fact and is inadmissible under both Rules 701 and 702. *Id.*

In this case, the loansharking terms explained by Jones fall squarely within the province of "coded" language beyond the comprehension of the average juror, and his opinion testimony was confined to portions of the tape containing those terms. Thus, the helpfulness requirement of both Rules 701 and 702 was met.

The proper provision for admission of Jones's testimony is Rule 702 because Jones lacked personal knowledge of the meaning which the parties to the wiretapped conversations attached to their remarks. In both *De Peri* and *Dicker*, which were decided under Rule 701, the testifying witness was a party to the conversation. Where the witness's interpretation of the conversation is based solely on his "specialized knowledge," the testimony is admissible under Rule 702 if the witness is qualified as an expert. *See United States v. Hoffman*, 832 F.2d 1299, 1310 (1st Cir. 1987) (DEA agent was qualified to interpret codes and jargon used by drug traffickers); *United States v. Nersesian*, 824 F.2d 1294, 1308 (2nd Cir.), *cert. denied*, 484 U.S. 958, 108 S.Ct. 357 (1987); *United States v. Riccobene*,

709 F.2d at 230 (FBI agent qualified to define terms such as "La Cosa Nostra," "Capi," and "consigliere" in organized crime context).

Given that Jones's opinion testimony was admissible for the limited purpose of defining the loansharking terms used by appellants, the sole remaining question is whether the district court abused its discretion in recognizing Jones as an expert. As stated in *Salem v. United States Lines Co.*, 370 U.S. 31, 35, 82 S.Ct. 1119, 1122 (1962), "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous."

Jones's qualifications were more than adequate to qualify him as an expert. He testified that he currently was a detective sergeant assigned to the Economic Crimes and Organized Crime Intelligence Unit of the Union County prosecutor's office. Over the course of his fourteen years of unemployment with that office, he had participated in wiretap investigations. He also had worked participated in wiretap investigations. He also had worked numerous undercover assignments in the investigation of "loansharking, credit card fraud, check fraud and gambling." In view of Jones's experience in the investigation of white collar crimes, including loansharking, it cannot be said that the district court abused its discretion in admitting him as an expert.[29]

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[29] *Aloe Coal Co. v. Clarke Equipment Co.*, 816 F.2d 110, 114 (3d Cir.), *cert. denied*, 484 U.S. 853, 108 S.Ct. 156 (1987), cited by Vastola in support of his argument that insufficient foundation was laid for Jones's testimony, is distinguishable. In *Aloe*, the

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Vastola's final complaint, that the prosecutor never formally moved to have Jones admitted as an expert, requires little discussion. Rule 702 does not condition the admissibility of expert testimony on the proponent's incantation of any particular phrases. While the usual trial practice of moving for the admission of expert testimony may place an adversary on notice that a witness's qualifications are in issue, in this case, the defense was fully aware that Jones would be testifying as an expert, as the prosecutor stated that in colloquy before Jones took the stand. Accordingly, we find that Jones's explanation of the loansharking terms was properly admitted under Rule 702.

## G. REFERENCES TO FEDERAL WITNESS PROTECTION PROGRAM

The government did not call John LaMonte, the victim of the MCA extortion, but instead relied primarily on wiretap evidence. To buttress his argument that he was aligned with LaMonte as a buyer in the MCA deal,

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court held that a sales representative for a tractor company was not qualified to give expert testimony in a negligence action as to the cause of a tractor shovel's malfunction. *Id.* Although the witness had extensive experience in determining the costs of repairing and replacing damaged equipment, he had no experience or training which would confer expertise as to how the equipment worked.

Here, Jones's undercover work in loanshark investigations and extensive experience in police wiretapping efforts undoubtedly provided him with knowledge of loanshark jargon beyond that of the average layperson.

Vastola, in his defense, played a tape which purportedly showed that his business dealings with LaMonte were consensual. Over objection, the prosecutor recalled Agent Mahoney in rebuttal to testify about LaMonte's active cooperation with the government. Before Mahoney took the stand, Vastola's attorney objected in colloquy that such testimony would be improper rebuttal because it was unresponsive to any issues raised by the defense. In response, the prosecutor argued that the rebuttal was needed to negate the defense's suggestion that the relationship between Vastola and LaMonte was consensual. The district court allowed the rebuttal on the understanding that it would be narrowly confined to the questions of when LaMonte's period of active cooperation with the government began and ended.

Mahoney testified that LaMonte began to actively cooperate with the government shortly after May 18, 1985. He further testified that LaMonte's period of active cooperation ended in late September of 1985 when "he and his family were placed in FBI protective custody, custody-not custody, but protection and the whole family was removed from the area." This was the last testimony the jury heard.

Defense counsel promptly moved for a mistrial on the ground that Mahoney's reference to the protective custody gave rise to an improper and prejudicial inference that LaMonte had not testified because he was afraid of the defendants. After the district court denied the motion, defense counsel renewed it and requested in the alternative that the court give a missing witness instruction to alleviate the prejudicial impact of Mahoney's testimony. The renewed motion was denied. However, the

following day, the court struck the final portion of Mahoney's testimony and instructed the jury to disregard it.

On appeal, Vastola argues that the district court's cautionary instruction was insufficient to remove the taint of Mahoney's testimony, and that the district court abused its discretion when it refused to give the requested instruction or grant a mistrial. We reject both of these contentions.

The district court's refusal to give a missing witness instruction clearly did not constitute reversible error. In *United States v. Busic*, 587 F.2d 577, 586 (3d Cir. 1978), *rev'd on other grounds*, 446 U.S. 398, 100 S.Ct. 1747 (1980), this court held that a missing witness instruction is not appropriate when the witness is available to both the defense and the prosecution. The court reasoned that the government's failure to call a particular witness does not warrant an inference that the witness's testimony would have been adverse; at most, it signifies that the testimony would have been unhelpful to the government's case. *Id. See United States v. Nahoom*, 791 F.2d 841, 846 (11th Cir. 1986). Here although LaMonte was in the federal witness protection program, there is no indication that he was unavailable to the defense. In fact, Vastola's attorney commendated in colloquy that he declined to call LaMonte because his testimony would have focussed on collateral matters. In these circumstances, a jury instruction that LaMonte's testimony would have favored the defense would no more justified than an instruction that his testimony would have favored the government.

Vastola's contention that he was entitled to a mistrial requires us to examine the nature and severity of the

prejudice he alleges. As a general proposition, we recognize the potential for unfair prejudice flowing from a witness's testimony about his or her involvement in the federal witness protection program. As stated in *United States v. Ciampaglia*, 628 F.2d 632, 640 (1st Cir.) *cert. denied*, 449 U.S. 956, 101 S.Ct. 365 (1980), "a witness's participation in a witness protection program 'is a matter than must be handled delicately' " as the jury might improperly consider evidence of such participation as proof of the defendant's alleged dangerous propensities. *Id.* at 640 (citation omitted). *See also United States v. Nahoom*, 791 F.2d at 845-46; *United States v. Frankenberry*, 696 F.2d 239, 242 (3d Cir. 1982), *cert. denied*, 463 U.S. 1210, 103 S.Ct. 3544 (1983). Arguably, references to a nontestifying victim's participation in the program carry greater potential for prejudice because the jury might falsely infer that the victim's absence was due to fear.

However, not all references to the federal witness protection program are prejudicial to the defense.[30] In *Frankenberry*, we held that the government may elicit the fact of a witness's involvement in the program so long as it "does not exploit any inference of threat from the defendant." 696 F.2d at 242. We further opined that in assessing prejudicial impact of the testimony, a court should consider whether it specifically inculpates the defendant as the source of threats to the witness. *Id.* at 243.

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[30] In fact, in some cases, defense attorneys have sought to use such evidence to impeach the credibility of government witnesses. *See United States v. Pandozzi*, 878 F.2d 1526, 1530 (1st Cir. 1989); *United States v. Tarantino*, 846 F.2d 1384, 1407 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 174 (1988).

If it does, then, on defense counsel's motion, the district court may be obligated to give a cautionary instruction or, in extraordinary cases, declare a mistrial. *See United States v. Carney*, 461 F.2d 465, 468 (3d Cir. 1972). However, the potential for prejudice is slight where the testimony only vaguely suggests that the witness was placed in the program because of threats emanating from the defendant. *Frankenberry*, 696 F.2d at 243. *Accord United States v. Panas*, 738 F.2d 278, 285 (8th Cir. 1984).

Bearing in mind these principles, we are unconvicted that Mahoney's testimony severely prejudiced the defense. Even assuming that the jury improperly inferred that LaMonte's absence was due to fear, given the large number of individuals involved in the RICO enterprise, it would be speculative to presume that any such inference was attributed to appellants' conduct. We further note that the prosecution made no further reference to the Witness Protection Program-it did not "exploit" Mahoney's testimony. Finally, given the overwhelming evidence of appellants' guilt as to the MCA extortion, we would be hard pressed to find that Mahoney's testimony, in itself, irreparably destroyed the defense.

Accordingly, we conclude that the district court did not abuse its discretion when it refused to declare a mistrial. *See United States v. Wright-Barker*, 784 F.2d 161, 175 (3d Cir. 1986). The district court's cautionary instruction was more than adequate to mitigate any unfair prejudice caused by Mahoney's testimony and, in keeping with *Greer v. Miller*, 483 U.S. 756, 766 n.8 107 S.Ct. 3102, 3109 n.8 (1987), we will assume that the jury followed it.

## H. APPOINTMENT OF NEW COUNSEL

Saka challenges his conviction on the ground that the district court abused its discretion in denying his pretrial court abused its discretion in denying his pretrial motion for assignment of new counsel. By letter dated October 10, 1988, Saka requested assignment of new counsel because his court-appointed attorney had "developed a series of physical, mental, emotional and domestic problems" as a result of a marital conflict. The district court held a hearing on October 12, 1988, to determine whether the attorney was competent to represent Saka at trial, which was scheduled to begin within a week but did not actually start until November 28, 1988.

At the hearing, Saka stated that he had known about his attorney's "domenstic problems" for approximately two months. Although Saka was satisfied with the attorney's representation of him at various hearings over that period, he felt that he had not adequately conferred with the attorney about trial strategy and believed that the attorney was "not fully able to handle" his case. In response to inquiries by the district court, the attorney acknowledged that he had experienced severe depression when his wife left him on September 8, 1988, and had become apprehensive about his ability to proceed with the case. However, he recently had started taking antidepressant medication and, after an initial adverse reaction which was eliminated by an adjustment of the dosage level, he stated that he felt fine and believed he was competent to represent Saka. The district court denied Saka's motion, stating that the relevant question was his attorney's competence at the time of the hearing. As there was no indication that the attorney currently was

experiencing a debilitating emotional disorder, the district court was satisfied he could effectively represent Saka.

The question before us is whether the district court's denial of the pretrial motion for appointment of new counsel constituted can abuse of discretion and if so, whether the denial caused Saka manifest prejudice requiring reversal of his conviction.[31] Under *United States v. Welty*, 674 F.2d 185, 190 (3d Cir. 1982), a district court, faced with a request for substitution of counsel, has a duty to "inquir[e] as to the reason for the defendant's dissatisfaction with his existing attorney" and should grant the request if "good cause" is shown. *Id.* at 187-88. *See also McMahon v. Fulcomer*, 821 F.2d 934, 942 (3d Cir. 1987).

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[31] Relying on a litany of cases in which this court has expressed its preference for viewing allegations of ineffective assistance of counsel in collateral proceedings under 28 U.S.C. § 2255 rather than on direct appeal, the government argues that Saka's claim is not ripe for review. *See United States' v. Sandini*, 888 F.2d at 312; *Government of Virgin Islands v. Forte*, 806 F.2d 73, 77-78 (3d Cir. 1986); *United States v. Gambino*, 788 F.2d 938, 950 (3d Cir.) *cert denied*, 479 US. 825, 107 S.Ct. 98 (1986). Saka, however, does not claim ineffective assistance of counsel but instead challenges a pretrial ruling that he was not entitled to substitution of counsel. While this claim implicates Sixth Amendment considerations insofar as we must consider whether Saka suffered any prejudice as a result of the district court's decision, Saka has not invoked directly his right to effective assistance of counsel. Accordingly, we conclude that the claim is reviewable on direct appeal. We further note that Saka remains free to raise a constitutional challenge his attorney's performance in a subsequent proceeding under section 2255.

Based on the record as it appeared at the time of the hearing, the district court acted well within its discretion in denying Saka's motion.[32] As the district court observed, the relevant question was whether at the time of the hearing, it appeared likely that the attorney could serve as a reasonably effective advocate at trial. Although Saka may have lost confidence in his attorney when he learned about the attorney's bout with depression, that alone would not constitute "good cause" for substitution of counsel, as Saka had no absolute right to counsel of his choice, *Davis v. Stamler*, 650 F.2d 477, 479-80 (3d Cir. 1981), or to a special rapport with his attorney, *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 1617 (1983). To prevail on his motion. Saka had to show that his attorney currently was experiencing problems so severe as to call into doubt his ability to render competent assistance at trial.

In view of Saka's own testimony that he had no specific objection to the attorney's representation of him at pretrial hearings and the attorney's assurances that he was prepared for trial and had overcome his previous emotional difficulties, there was no reason for the district court to have granted the motion. Certainly, it cannot be said that every attorney who has experienced an emotional crisis while preparing for a trial automatically must be disqualified from proceeding with the representation. If the attorney is competent and adequately prepared at the time of trial, it is within the discretionary power of the district court to refuse to substitute new counsel.

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[32] In fact, the district court is to be commended for the sensitivity is displayed in evaluating Saka's claim.

Given our finding that there was no abuse of discretion, we need not consider whether Saka suffered prejudice as a result of the district court's decision. However, even assuming an abuse of discretion, we still would have no basis for reversing Saka's conviction because he has not claimed that he was prejudiced by the ruling. As recently observed in *Sandini*, 888 F.2d at 305, our inquiry into the propriety of a discretionary pretrial ruling involves "two separate determinations," whether the district court exceeded its discretion and whether the defendant thereby was prejudiced. As Saka has pointed to nothing in the record which suggests that his fears at the time of the hearing materialized, we would have no choice but to reject his claim even if he had demonstrated good cause for the appointment of new counsel.

## I. THE ELECTRONIC SURVEILLANCE

### 1. *Background*

The government's evidence at trial consisted largely of tapes made from electronic surveillances of conversations between the co-conspirators from late 1984 to October 1985 pursuant to state and federal court orders, as well of tapes of consensually recorded conversations from May 1985 to September 1985 between the co-conspirators and John Lamonte, the victim of the MCA extortionate collection conspiracy.

State and federal authorities engaged in surveillance activities in at least four jurisdictions – New Jersey, Maryland, and the Southern and Northern Districts of New York – and, at the conclusion of the surveillances, all of the tapes were sealed in accordance with the Wiretap

Act.[33] 18 U.S.C. § 2518(8)(a). The sealing orders pertaining to the federal tapes provided that the FBI was to maintain custody of the tapes and that the contents of the tapes were to be disclosed only pursuant to court order, except as provided by 18 U.S.C. § 2517.

On October 6, 1987, Judge Breitkopf of the New Jersey Superior Court entered orders permitting the unsealing by a federal district court judge of approximately seven state wires, covering over a hundred reels of tape, "for use in the preparation and during the several trials of" the defendants named in the original indictment. All

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[33] In 1987, when the district court granted appellants' motion for severance, it also denied a motion, joined in by all defendants named in the original indictment, to suppress evidence from the electronic surveillance. *United States v. Vastola*, 670 F. Supp. 1244, 1276 (D.N.J. 1987). In that ruling, the court expressly found, with few exceptions, that the government had adequately shown probable cause for the surveillances and that the surveillance orders themselves were valid. *Id.* Appellants also moved to suppress evidence from the wiretapping of Video Warehouse, the situs of the criminal enterprise, on the ground that the wiretapping ended on March 25, 1985, but the tapes were not sealed until July 15, 1985. *Id.* at 1282. The court found that the integrity of the tapes had not been compromised and therefore suppression was not justified. *Id.* (citing *United States v. Falcone*, 505 F.2d 478, 484 (3d Cir. 1974)).

On appeal, Saka argues that the tapes should have been suppressed due to the governments delay in sealing them but has not challenged the district court's finding that the tapes had not been altered. As the district court's decision was fully consistent with *Falcone*, we will not further discuss the implications of the sealing delay. Saka has not appealed the district court's ruling that the initial interception order was supported by probable cause.

of the orders specified that the tapes were to be "maintained in a secure place within the Offices of the United States Attorney for the District of New Jersey." The government has conceded a "technical departure" from Judge Brietkopf's unsealing order in that the tapes were not physically unsealed before a federal judge.

On October 15, 1987, the district court ordered the unsealing of numerous federal tapes which resulted from surveillances in New Jersey for use in the pretrial preparation and trials in *United States v. Vastola*. The order was issued pursuant to a supporting affidavit filed by an Assistant United States Attorney which stated that unsealing was necessary "so that electronically enhanced copies of portions of the recordings [could] be prepared for use as trial exhibits." Unlike Judge Brietkopf, the district court did not specify where custody of the tapes was to be maintained.

On August 5, 1988, Judge Howey of the United States District Court for the District of Maryland ordered the unsealing of the "Maryland" tapes, specifying that custody was to be maintained by special FBI agents in Newark, New Jersey. He also stated that "[t]he Special Agents in whose custody such tape recordings are released may permit technicians working with the United States Attorney's Office for the District of New Jersey to make copies of them." A similar order was entered by Judge Scully of the United States District Court for the Southern District of New York on April 6, 1988.

After the unsealing orders were executed, the government sent all of the original tapes to Paul Ginsberg, a

private individual it had employed to enhance and authenticate the tapes. It is undisputed that Ginsberg had unsupervised possession of the tapes for approximately 35 days while he was enhancing them, and that he was not deputized by any court to perform that function.

Ginsberg testified as an expert about the procedures he had used in enhancing the tapes. He explained that

> [e]nhancement is a misnomer. We don't enhance anything per se. But rather we'll take a signal from a tape recorder on which there is a conversation recorded, feed it through certain equipment which is designed to null out or minimize offending signals or other noise which is beyond the limits of the human voice spectrum, and the results is what we call the enhanced copy.

Appendix at 485.

He asserted that in the filtration process, there is no risk of alteration in the content of the enhanced copy, and that the original tapes are in no way modified. Ginsberg placed the originals in a locked storage container when he was not using them. At the government's request, Ginsberg also examined the tapes for signs of tampering before and after he enhanced them and concluded that the integrity of the tapes had not been compromised.

*2. Admissibility of Evidence from Electronic Surveillance*

Saka argues that the district court erred in admitting the tapes from the electronic surveillance because the government violated the various court unsealing orders in contravention of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20

[hereinafter Wiretap Act].[34] Specifically, he maintains that the government, in sending the tapes to Ginsberg for enhancement, exceeded the scope of the unsealing orders, which never contemplated that a private individual would have unsupervised custody of the tapes for a prolonged period of time, or that the government would do anything more than copy the tapes for trial.

Saka relies on section 2518(8)(a) of the Wiretap Act, which provides in pertinent part that:

> The contents of any wire, oral or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. . . . Immediately upon the expiration of the period of the [wiretap] order, or extensions thereof, *such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders.* . . . The presence of the seal . . . or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

18 U.S.C. § 2518(8)(a) (emphasis supplied).

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[34] He also suggests that the New Jersey state tapes were never unsealed. Presumably, he is referring to the government's failure to comply with Judge Brietkopf's order, which required the participation of a federal district court judge in the unsealing process. This technical infraction of the unsealing order does not, however, warrant a conclusion that the tapes were never unsealed. Although the government did not strictly comply with the terms of Judge Brietkopf's orders, that does not negate the fact that the unsealing orders were entered and executed.

Section 2517(3), in turn, provides for the use of such tapes as evidence in federal and state criminal proceedings.

According to Saka, section 2518(8)(a) evinces legislative intent that courts will closely supervise all phases of the government's handling of evidence derived from electronic surveillances. He analogizes this case to situations where other courts have held that, in certain circumstances, it might be necessary to suppress evidence due to lengthy delays in the sealing of the tapes. *See, e.g., United States v. Ojeda Rios*, 875 F.2d 17 (2d Cir. 1989), *cert. granted*, 110 S.Ct. 231 (1989); *United States v. Mora*, 821 F.2d 860 (1st Cir. 1987).

As the government points out, however, section 2518(8)(a) on its face deals with *sealing* requirements, rather than with the use or treatment of tapes after their unsealing. The government relies-as did the district court-on section 2517(2). Under that section:

> [a]ny investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral or electronic communication or evidence derived therefrom may use such *contents to the extent such use is appropriate to the proper performance of his official duties.*

18 U.S.C. § 2517(2) (emphasis supplied).

According to the government, its enhancement of the tapes falls squarely within section 2517(2) because it was part of the United States Attorney's trial preparation and thus was incident to the performance of an "official duty."

Neither party is entirely correct, although the government's ultimate conclusion that the tapes were admissible is unassailable. Reading subdivision (2) of section 2517 in light of its legislative history and the section as a whole, it seems clear that, in that subdivision, Congress was concerned with the substantive use of information contained in tapes rather than with the physical treatment of the tapes themselves. Section 2517(1) limits the disclosure of the tapes' contents to an "investigative or law enforcement officer" to situations where the disclosure "is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure." 18 U.S.C. § 2517(1). Other subdivisions of section 2517 address the use of such evidence in criminal proceedings, section 2517(3), the privileged character of the evidence, section 2517(4), and preconditions for the use of evidence of crimes not enumerated in the original interception application, section 2517(5).

Furthermore, the legislative history to section 2517(2) indicates that, by "use . . . appropriate to the proper performance of . . . official duties," Congress "envision[ed] use of the contents of intercepted communications . . . to establish probable cause for arrest . . . [or] search" or other substantive uses. S. Rep. No. 1097, 90th Cong., 2d Sess. 107, *reprinted in* 1968 U.S. Code Cong. & Admin. News., at 2188. In view of its legislative history, it is difficult to see how this provision could apply to a government use alleged to compromise the physical integrity of the tapes.

In fact, no section of the Act expressly defines the government's responsibility in handling tapes subsequent to the execution of an unsealing order; such cases fall

within a statutory gap. *See United States v. Angiulo*, 847 F.2d 956, 977 (1st Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 314 (1988). However, we cannot infer from this legislative oversight that Congress was indifferent to the government's treatment of tapes after their unsealing, as an overriding legislative concern quite clearly was to prevent the admission of wiretap evidence which has been subject to tampering. Therefore, while the literal language of section 2518(8)(a) would indicate that the section is limited to the sealing requirement, we will consider the propriety of the enhancement under that section, as we agree with Saka that it is the primary vehicle through which Congress sought to ensure the physical integrity of wiretap evidence.[35] *Accord Angiulo*, 847 F.2d at 977 ("the standards applicable in delay-of-sealing cases . . . are relevant to the unsealing problem").

The government contends that suppression is available under section 2518(8)(a) only where there is no seal affixed to the tapes "or a satisfactory explanation for the absence thereof."[36] As the tapes were unsealed by court

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[35] The legislative history to section 2518(8)(a) indicates that it was intended to establish procedures "to safeguard the identity, physical integrity, and contents of the recordings to assure their admissibility into evidence." 1968 U.S. Code & Admin. News at 2193. Furthermore, the legislative history to section 2517 states that it "must . . . be read in light of section 2518." *Id.* at 2188. Therefore, even if we applied section 2517 and concluded that the enhancement was incident to the performance of official duties, we still would be bound to consider whether admission of the tapes was consistent with section 2518.

[36] The government also argues that, insofar as Saka challenges an unauthorized disclosure of the contents of the wire

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order, the government maintains that it had a satisfactory explanation for the absence of a seal and therefore, suppression was unwarranted. This argument, although consistent with the literal language of section 2518(8)(a), is unresponsive to the specific problem raised by Saka, which concerns the government's responsibilities in handling the tapes after their unsealing. As pointed out in *United States v. Mora*, 821 F.2d at 864-65, which involved a sealing delay, a literal construction of section 2518(8)(a) could lead to outlandish results, as it would permit the admission of tapes which remained unsealed for months as long as the government had them sealed on the eve of trial. 821 F.2d at 865 ("An untimely seal contravenes the

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intercepts to Ginsberg, he is limited to the civil remedy set forth in section 2520. That assertion clearly is correct. *See United States v. Iannelli*, 477 F.2d 999, 1001 (3d Cir. 1973), *aff'd on other grounds*, 420 U.S. 770, 95 S.Ct. 1284 (1975) ("the suppression remedy specified in 18 U.S.C. § 2518(10) applies to unlawful interceptions. A civil remedy applies to unauthorized disclosures. 18 U.S.C. § 2520."). *See also Resha v. United States*, 767 F.2d 285, 288 (6th Cir. 1985), *cert. denied*, 475 U.S. 1081, 106 S.Ct. 1458 (1986); *United States v. Vento*, 533 F.2d 838, 855 (3d Cir. 1976). Therefore, in a civil proceeding under section 2520, Saka is free to argue that a private individual never should have been privy to the contents of the tapes because they were privileged. 18 U.S.C. § 2517(4). We will not resolve that question in a direct appeal from a criminal conviction.

As we understand Saka's argument, however, the gravamen of his complaint is that the government failed to comply with court orders intended to ensure the physical integrity of the tapes and, if its conduct is approved by this court, the statutory safeguards of Title III will be undermined. Accordingly, we are treating this as a "physical integrity" case.

spirit of the statute just as much as a missing seal."). By the same token, it strains credibility to suggest that Congress authorized the admission of all wiretap evidence which is unsealed, without regard for how the tapes were treated after their unsealing.

The primary purpose of section 2518(8)(a), however, is to ensure the physical integrity of the tapes. *Mora*, 821 F.2d at 867; *United States v. Diadone*, 558 F.2d 775, 780 (5th Cir. 1977), *cert. denied*, 434 U.S. 1064, 98 S.Ct. 1239 (1978); *United States v. Angelini*, 565 F.2d 469, 471 (7th Cir. 1977), *cert. denied*, 435 U.S. 923, 98 S.Ct. 1487 (1978); *United States v. Falcone*, 505 F.2d 478, 484 (3d Cir. 1974), *cert. denied*, 420 U.S. 955, 95 S.Ct. 1339 (1975). In *Falcone*, a "sealing delay" case, we held that:

> where the trial court has found that the integrity of the tapes is pure, a delay in sealing the tapes is not, in and of itself, sufficient reason to suppress the evidence obtained therefrom.
>
> 505 F.2d at 484.

This holding was consistent with *United States v. Giordano*, 416 U.S. 505, 527, 94 S.Ct. 1820, 1832 (1974), where, in reference to an unlawful interception, the Supreme Court stated that "Congress intended to require suppression where there is a failure to satisfy those statutory requirements that *directly and substantially* implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extrordinary investigative device." Thus, not every technical infraction of the statute mandates suppression. Rather, the defendant must point to a statutory violation which creates a serious risk that the legislative purpose will be thwarted. *See United States v. Chavez*,

416 U.S. 562, 574-75, 94 S.Ct. 1849, 1856 (1974) ("suppression is not mandated for every violation of Title III.")[37]

Here, Ginsberg gave compelling testimony that the integrity of the tapes was not compromised in the enhancement process. We realize that the some appellate courts have indicated that wiretap evidence may be suppressed without proof of tampering on the theory that alterations of the recordings often are difficult to detect. *See United States v. Massino*, 784 F.2d 153, 156 (2d Cir. 1986); *United States v. Johnson*, 696 F.2d 115, 124 (D.C. Cir. 1982) (interpreting D.C. Code). *Cf. United States v. Ojeda Rios*, 875 F.2d at 23 (lengthy delay in sealing of tapes requires suppression unless government proffers a "satisfactory explanation" for the delay). However, even if we were inclined to follow these cases, this would not be an appropriate time for doing so, as Ginsberg's uncontroverted

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[37] *Giordano* and *Chavez* both were decided under section 2518(10)(a), which provides for the suppression of "unlawfully intercepted" communications, evidence obtained pursuant to an "insufficient" authorization order, and evidence obtained through interceptions "not made in conformity" with the order. Neither the Supreme Court nor this court has had occasion to decide whether section 2518(8)(a) furnishes a basis for suppression independent of section 2518(10)(a). If the suppression remedy is confined to section 2518(10)(a), then the government could with impunity engage in the wholesale editing of all tapes lawfully intercepted, because section 2518(10)(a) on its face deals only with interceptions. Given our conclusion that the tapes were lawfully admitted, we need not resolve this question today. However, we do point out that it is highly unlikely that Congress intended to allow a criminal conviction to rest on wiretap evidence which had been subject to tampering.

testimony was that tampering can be detected by competent experts in the field of electronic enhancement and, in any event, Saka does not seriously contend that the tapes were subject to tampering. Therefore, we have no basis for concluding that the type of harm the statute was meant to prevent occurred here.

Accordingly, we hold that the tapes were admissible notwithstanding the government's technical infraction of the custody requirements of the unsealing orders, as there is no showing that the government's relinquishment of control over the tapes caused a "direct[] and substantial[]" violation of section 2518(8)(a).

## IV. CONCLUSION

We have considered appellants' remaining contentions and find them to be without merit.[38] In view our

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[38] Vastola asserts that the district court abused its discretion when it permitted two law enforcement officers to testify, over objection, that they were assigned to organized crime units. According to Vastola, this background evidence was inadmissible under Fed. R. Evid. 403 because its probative value was outweighed by its prejudicial effect, as it gave rise to an improper inference that appellants had organized crime connections. Our scope of review of this question is limited. *United States v. Long*, 574 F.2d 761, 767 (3d Cir.), *cert. denied*, 439 U.S. 985, 99 S.Ct. 577 (1978). In this case, we do not believe that the district court exceeded its discretion, as evidence regarding the officers' unit assignments served the legitimate purpose of apprising the jury of their qualifications for investigating appellants' activities. *Cf. United States v. Daley*, 842 F.2d 1380, 1388-89 (2d Cir. 1988) (background evidence as to structure of organized crime families was properly admitted under Rule 403 balancing test).

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decision herein, the judgment of conviction and sentence of Vastola under Count 2 will be reversed and he will be acquitted on that count and the judgment of acquittal for Vastola under Count 1 will be reversed and his conviction will be reinstated on that count. Except to the foregoing extent regarding Vastola, appellants' convictions will be affirmed. The case will be remanded to the district court for further proceedings consistent with this opinion. Vastola shall be sentenced on count one and shall be resentenced on all the other counts on which he was convicted except for Count 2. *See United States v. Sebetich*, 776 F.2d 412, 415 & n.2 (3d Cir. 1985), ___ U.S. ___, *cert. denied*, 108 S.Ct. 725 (1988).

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Saka contends that three warrants to search his automobile, residence and business for evidence of copyright violations failed to satisfy the Fourth Amendment particularity requirements. As a result, he argues that "[a]ll of the video recordings, blank tapes and video equipment should have been suppressed." He does not, however, point to any evidence introduced at trial which was seized pursuant to the allegedly defective warrants. Because Saka was not prosecuted for copyright violations, and has not demonstrated that any unlawfully seized evidence was used against him at trial, we need not reach the Fourth Amendment issues he raises. Assuming, *arguendo*, that the warrants were constitutionally deficient and that evidence obtained pursuant to them was improperly admitted, a reversal on this ground still would be inappropriate because the government's most damaging evidence against Saka derived from its electronic surveillance of Video Warehouse and other locations. Accordingly, at best, he has pointed to a constitutional error which was harmless beyond a reasonable doubt. *See Chapman v. State of California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967); *United States v. Clemons*, 843 F.2d 741, 753 (3d Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 97 (1988).

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit*

**UNITED STATES of America,**

**v.**

**Gaetano VASTOLA, a/k/a "Tommy," a/k/a "Corky," a/k/a "The Galoot," a/k/a "The Big Guy," Palmer Brocco, a/k/a "Sonny," Nicholas John Massaro, Jr., Rudolph Farone, Larry Martire, Elias Saka, a/k/a "Lew," Benjamin Stone, George Santoni, Thomas Zito, a/k/a "Mr. Gordon," a/k/a "Tommy Russo," Charles Majuri, Dominick Canterino, Morris Levy, Howard Fisher, Alexander D'Alessio, Sr., a/k/a "Pope," Alexander D'Alessio, Jr., a/k/a "Popie," John Brennan, a/k/a "Jack," Barry Harris, Bruce Howard, Daniel Marino, Paul Sanzaro, and Vincent Uris, a/k/a "Butch", Defendants.**

**Crim. A. No. 86-301(SSB).**

United States District Court,
D. New Jersey.

Sept. 1, 1987.

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Office of the U.S. Atty. by Bruce Repetto, Andrew T. Baxter, Asst. U.S. Attys., Newark, N.J., for U.S.

Michael Rosen, New York City, for defendant Vastola.

Ryan, Pedicini & Donnelly by Rita Donnelly, West Orange, N.J., for defendant Brocco.

Joshua Markowitz, Lawrenceville, N.J., for defendant Massaro.

DeCotiis, Frino & Lundstein by William R. Lundstein, Roseland, N.J., for defendant Farone.

Cathy Waldor, Montclair, N.J., for defendant Martire.

Lyle Hough, Trenton, N.J., for defendant Saka.

Office of the Federal Public Defender by Richard Coughlin, Asst. Federal Public Defender, Camden, N.J., for defendant Stone.

Tomar, Seliger, Simonoff, Adourian & O'Brien by Charles N. Riley, Haddonfield, N.J., for defendant Santoni.

Barry Schulman, Brooklyn, N.Y., for defendant Zito.

Raymond R. Beam, Jr., Bloomfield, N.J., for defendant Majuri.

Michael B. Pollack, New York City, for defendant Canterino.

Michael Querques, Orange, N.J., for defendant Levy.

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David L. Rhodes, Lawrenceville, N.J., for defendant Brennan.

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OPINION

BROTMAN, District Judge:

## I. INTRODUCTION

Presently before the court are a voluminous set of pretrial motions. Oral argument was heard on the *Brady* motion of defendants Levy and Fisher on June 12, 1987, and the remainder of the motions were argued on July 10, 1987. This case is based on a 114-count indictment naming 21 defendants. Ten defendants are named in counts alleging violations of the Racketeering Influenced Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961 *et seq.* Count 1 alleges a § 1962(c) violation based on a "pattern of racketeering activity." Count 2 alleges a § 1962(c) violation based on "collection of unlawful debt." These two

counts are referred to throughout the opinion as substantive RICO counts. Count 3 alleges a § 1962(d) violation based in a RICO conspiracy. This count is referred to as the RICO conspiracy count. The remaining counts fall into the following categories of criminal activity: narcotics, usury and extortion, mail ("bust-out") fraud, wire ("Western Union") fraud, copyright (video "bootlegging") fraud, insurance fraud, bankruptcy fraud, gambling, and firearms

The pretrial motions are grouped into categories and discussed in parts II-V of this opinion: Part II, motions to dismiss, to strike, and to force the government to elect between charged offenses and counts; Part III, motions to sever; Part IV, motions for pretrial hearings and discovery; and Part V, motions to suppress. The order follows the opinion.

## II. MOTIONS TO DISMISS, TO STRIKE AND TO FORCE THE GOVERNMENT TO ELECT BETWEEN CHARGED OFFENSES AND COUNTS

### A. Defendants' Joint Motion to Dismiss Counts 1 and 3; or in the Alternative to Dismiss Acts 1, 17, 18, and Count 1, ¶5 Because Multiple Conspiracies are Plead as Predicate Acts

Defendants move to dismiss counts 1 and 3 because they include conspiratorial acts as predicate offenses. This is allowed by the plain language of the statute. 18 U.S.C. § 1961(1). The government cites second circuit law endorsing this practice. *United States v. Ruggiero*, 726 F.2d 913, 923 (2d Cir.), *cert. denied*, 469 U.S. 831, 105 S.Ct. 118, 83 L.Ed.2d 60 (1984); *United States v. Santoro*, 647 F.Supp.

153, 177-78 (E.D.N.Y.1986). It appears that the Third Circuit Court of Appeals has not directly faced the question. The defense asserts that third circuit law, under *Gomberg*, requires that such pleading not be allowed. *See United States v. Gomberg*, 715 F.2d 843 (3d Cir.1983). However, *Gomberg* is not squarely on point. It addresses a duplicity question and holds that a single conspiracy count can allege multiple crimes. 715 F.2d at 846. The alleged RICO conspiracy (count 3) has multiple objects contained in the pattern of racketeering and the collection of unlawful debt. At the trial the government will have to prove beyond a reasonable doubt that there existed a unified agreement to participate in the affairs of the "Vastola enterprise" through a pattern of racketeering or through the collection of unlawful debt. *See United States v. Boffa*, 513 F.Supp. 444, 475 (D.Del.1980). The multiple conspiracy doctrine requires that all RICO enterprises defendants be shown to have a nexus "which signals the existence of a truly unified agreement." *Id.* at 474; *see also* United States v. Smith, 789 F.2d 196, 200 (3d Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 668, 93 L.Ed.2d 720 (1986) (In commenting on a mail fraud conspiracy indictment, the court stated, "a finding of a master conspiracy with sub-schemes does not constitute a finding of multiple, unrelated conspiracies and, therefore, would not create an impermissible variance.") One district court judge in New Jersey has explicitly rejected the second circuit approach. *See United States v. Local, 560, Int'l Brotherhood of Teamsters*, 581 F.Supp. 279, 332 (D.N.J. 1984) ("I conclude that proof of a state of mind apart from that required for the commission of the predicate offenses must be demonstrated for each alleged conspirator."). This court adopts

the reasoning of *Teamsters*. If the evidence at trial shows unrelated multiple conspiracies, defendants will be entitled to acquittal on the RICO conspiracy charges. *Boffa*, 513 F.Supp. at 475 ("If the evidence offered at trial presents a variance in proof demonstrating multiple conspiracies, which affects the substantial rights of the defendants, they will be entitled to acquittal on Count I [RICO conspiracy count]."). Therefore, defendants' motion is denied without prejudice to renewal at the close of the government's case.

**B. Defendants' Joint Motion to Compel the Government to Elect Between the Two Substantive RICO Counts (1 and 2)**

Defendants seek an order requiring the government to elect between counts 1 and 2 because they are multiplicious. Count 1 alleges a violation of § 1962(c) on the basis of a "pattern of racketeering" and count 2 alleges a violation of § 1962(c) on the basis of a "collection of unlawful debt." Defendants argue in their joint brief that each count charges the same conduct as evidenced by application of the "same evidence" test. Memorandum of Law ("MOL") in Support of Defendants' Substantive Motions 61-63. In their reply brief, defendants shift their argument to one focusing on the "allowable unit of prosecution." Reply MOL In Support of Defendants' Substantive Motions 21-22. The court rejects both arguments and finds that counts 1 and 2 are not multiplicious.

" 'Multiplicity' is the charging of a single offense in several counts." 1 C. Wright, *Federal Practice and Procedure* Criminal 2d § 142 at 469. Count 1 alleges among other

predicate acts, certain extortionate acts under 18 U.S.C. § 892 (extortionate extension of credit and related conspiracy), and § 894 (extortionate collection of debt and related conspiracy). Count 2 alleges collection of unlawful debt. These counts do not charge the same criminal conduct. Extortion is defined in 18 U.S.C. § 1951(b)(2) as "the obtaining of property from another, with his consent, induced by the wrongful use of actual or threatened force, violence or fear. . . ." Unlawful debt is defined in pertinent part under RICO as "a debt . . . which is unenforceable under state or federal law in whole or in part as to principal or interest because of the laws relating to usury. . . ." 18 U.S.C. § 1961(6). The count 2 charge does not require proof of extortionate actions. In order to determine if these counts charge separate criminal conduct, one must inquire as to "whether proof of one offense charged requires an additional fact that proof of the other offense does not necessitate." *United States v. Carter*, 576 F.2d 1061, 1064 (3d Cir.1978); *see also Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). In the RICO context, a number of circuits have adopted a five-point test to determine if "pattern of racketeering" counts are multiplicious. *United States v. Ruggiero*, 754 F.2d 927, 932 (11th Cir.), *cert. denied*, 471 U.S. 1127, 105 S.Ct. 2661, 86 L.Ed.2d 277 (1985) (Counts are multiplicious if they involve: (1) same time period, (2) same place, (3) same persons, (4) same statutes, and (5) same nature and scope of activities.); *see also United States v. Russotti*, 717 F.2d 27, 33 (2d Cir. 1983), *cert. denied*, 465 U.S. 1022, 104 S.Ct. 1273, 79 L.Ed.2d 678 (1984); *United States v. Dean*, 647 F.2d 779 (8th Cir.), *modified on other grounds*, 667 F.2d 729 (8th Cir. 1982), *cert. denied*, 456 U.S.

1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982). It is clear that the nature of extortion activities requires a showing of additional proof to the showing required for unlawful debt collection activities.

Defendants argue in their reply brief that the "same evidence" test is not determinative and instead, point to the "allowable unit of prosecution" of § 1962(c). They assert that the unit is "the conduct of the enterprise." Reply MOL at 23. However, the court reads § 1962(c) as containing three elements. The first is a person associated with an enterprise, the second is an enterprise involved in interstate or foreign commerce, and the third is participation in such conduct through one of two prongs: a pattern of racketeering or collection of an unlawful debt. All three elements make up the unit of prosecution. *See generally United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981).

It appears that prosecutions under the unlawful debt provisions are rare. *United States v. Pepe*, 747 F.2d 632, 673 (11th Cir. 1984). However, prosecution of the same defendant in multiple counts under § 1962(c) alleging different patterns of racketeering has been allowed. *Ruggiero*, 754 F.2d at 931 ("Because of this separate [pattern of racketeering] element, an individual may be prosecuted for more than one violation of subsection § 1962(c) in connection with the same enterprise, so long as each violation involved a 'different pattern of racketeering activity.' ") (citations omitted). One court has noted *in dicta* that stating an unlawful debt charge and a pattern of racketeering charge in separate counts would be acceptable. *Pepe*, 747 F.2d at 659. This court finds that the pattern of racketeering charge and the unlawful debt charge allege

different violations of the same statute and are not multiplicious.

The defense's reliance on *Sanabria v. United States*, 437 U.S. 54, 69 n. 24, 98 S.Ct. 2170, 2182 n. 24, 57 L.Ed.2d 43 (1978), is misplaced. *Sanabria* addresses a single violation of a single statute. This court's review of the indictment in this case shows that counts 1 and 2 charge different violations, one for a pattern of racketeering and one for collection of unlawful debt. *Cf. United States v. Dean*, 647 F.2d at 788 (Determination in a given case of the number of patterns or agreements requires examination of the four corners of the charges.). Defendants' motion is denied.

### C. Defendants' Joint Motion to Strike Surplusage from the Indictment

Defendants move to strike as surplusage portions of the indictment including the preamble (5 pages preceding count 1), the use of the words "racketeering" and "loansharking," and the use of aliases. In addition, at oral argument defendants moved to strike phrases such as "and with others" and "and other criminal means."

> A motion to strike surplusage from an indictment is addressed to the sound discretion of the District Court and should be granted only where it is clear that the allegations contained therein are not relevant to the charge made or contain inflammatory and prejudicial matter.

*Dranow v. United States*, 307 F.2d 545, 558 (8th Cir.1962); *see also United States v. DeFabritus*, 605 F.Supp. 1538, 1546 (S.D.N.Y.1985). The court will apply the above articulated standard to language challenged by defendants.

### (1) The Preamble

The indictment contains a five-page preamble including a descriptive paragraph on each of the twenty-one defendants. They appear to be arranged in an order of importance in terms of criminal culpability – defendant Gaetano Vastola, the alleged "boss," is first, followed by the nine other RICO defendants, who are in turn followed by the eleven non-RICO defendants.

The government characterized the preamble as a "roadmap" at oral argument and asserted that it "modifies" the 114 counts of the indictment. The court is not opposed to the idea of the use of a roadmap-type preamble in a complex multi-defendant case. However, the particular preamble in question raises several serious concerns.

First of all, it contains additional narrative which is not contained in the counts of the indictment. The preamble is not simply a roadmap indicating which defendants are indicted for which crimes. It contains information which may be meaningful to a jury's consideration of the guilt of the defendants. For example, the paragraph describing defendant Vastola states that he was the "boss of the Vastola Organization," that he "represented his Organization in its dealings with other criminal groups," and that he was in a "position of ultimate authority." The paragraph describing defendant Brocco, a RICO defendant, states that he was a "cousin and close associate of Vastola," that he "frequently directed the illegal conduct of other members," and that he participated in "most of the criminal activities of the organization." The paragraph describing defendant Uris, a non-

RICO defendant, states that he was "actively involved in the operation of the Vastola Organization's illegal bookmaking facility on Staten Island." The court is concerned that the jury's deliberations will be unduly influenced by the preamble (the jurors have a copy of the indictment while deliberating), yet the jury will not explicitly be required to evaluate the probativeness of this information. Since the information is not specifically confined within any particular count or counts, the court is concerned that the jury could refer to it and consider it in evaluating counts to which it does not apply. For example, defendant Vastola's "dealings with other criminal groups" as described in the preamble may be considered by the jury in evaluating each and every charge against him, when only some of those charges involve such dealings. The preamble lacks any instructive device to link the narrative information contained in it with the particular charges it is meant to modify. The danger is particularly acute for the non-RICO defendants who are included in the same preamble listing as the RICO defendants. Each non-RICO defendant is described as carrying out a criminal activity of the "Vastola Organization" or the "Vastola enterprise." The references in the narrative to the organization or enterprise are relevant to the RICO allegations and thus not necessarily unduly prejudicial to the RICO defendants. The content of the narrative on the non-RICO defendants along with the location in the same preamble listing as the RICO defendants may lead the jury to infer that the non-RICO defendants are accused of RICO crimes. Anything in the indictment that allows the jury to infer involvement with uncharged crimes (whether the inference is based on the location of narrative

descriptions or the content of such descriptions) is improper. *DeFabritus*, 605 F.Supp. at 1547; *United States v. Hubbard*, 474 F.Supp. 64, 82-83 (D.D.C.1979); *United States v. Brighton Bldg. and Maintenance Co.*, 435 F.Supp. 222, 230 (N.D.Ill.1977), *aff'd* 598 F.2d 1101 (7th Cir.), *cert. denied*, 444 U.S. 840, 100 S.Ct. 80, 62 L.Ed.2d 52 (1979).

In addition to the court's concern that narrative information in the preamble will be used to modify charges to which it does not apply, the preamble contains irrelevant and vague language which may imply guilt by association or insinuate unalleged facts. For example, defendant Brocco is described as a "cousin" of Vastola who "frequently directed illegal conduct" and who participated in "*most* of the criminal activities." (emphasis added). Although the government's evidence may turn out to prove these allegations, they are not specifically relevant to all the crimes alleged and allow improper inferences.

> [T]he words "various," "including but not limited to the following," "among other things," "and related matters," "on a number of occasions," "at least," "other illegal and improper activities," "and elsewhere," and "besides the defendants" shall be stricken from the indictment as irrelevant and prejudicial.

*Hubbard*, 474 F.Supp. at 82.

In addition to this court's apprehension of the prejudicial effect of the preamble on jury deliberations, the court is concerned with the prejudicial effect on the jury of listening to the *judge* recite this preamble at the opening of the case. The court in no way is ruling that the

government is prohibited from properly introducing these allegations in opening to the jury.

The court has considered various alternative means to remedy its above described objections to the preamble. The prejudice to the non-RICO defendants is the most serious objection and the most difficult to remedy. If the court were to strike the narrative as to the non-RICO defendants and the objectionable language (described later in subparts 2-4) as to the RICO defendants, the resulting preamble would be so tortured that it would be of little use. Therefore, the court will strike the entire preamble.

As alluded to earlier, this court is not opposed to the use of a preamble per se. However, its function should be to serve as a guide to what is alleged in the counts that the jury will actually evaluate. It should not contain additional information to what is alleged in the counts, nor should it contain terminology that carries with it connotations of culpable behavior. The court notes *in dicta* that the problem of the inference of uncharged crimes bearing on the non-RICO defendants could be cured either by striking references to the RICO enterprise in the narrative following each non-RICO defendant's name, or by confining such references to the count charging the RICO enterprise.

**(2) "Racketeering" and "Loansharking"**

The challenge to the use of the word "racketeering" is without merit. It is a statutory term and used throughout the indictment in a reasonable manner. *United States*

*v. Ianniello*, 621 F.Supp. 1455, 1479 (S.D.N.Y.1985), *aff'd*, 808 F.2d 184 (2d Cir.1986); *United States v. Persico*, 621 F.Supp. 842, 860 (S.D.N.Y.1985).

The defendants also challenge the use of the word "loansharking," which is not a statutory term. The term is used on numerous occasions; in count 1 for example, "loansharking and extortion" and "loanshark victims." *See* counts 1, 1(b), and 2(c). In addition, the chart in count 1 entitled "Pattern of Racketeering Activity – Racketeering Acts" includes a category of "Loansharking and extortion" acts which correspond to counts 30, 31, 35, 36-39, 40, 95, and 97. The court is concerned that the term "loansharking" as used is redundant and will have an inflammatory effect on the jury. The word "loansharking" is defined as "the practice of lending money at exorbitant rates of interest," *Websters' New Collegiate Dictionary* 674 (1975), yet the court is concerned that the word has connotations of threatening behavior. To the extent that the word is used to suggest threatening behavior, it is redundant because "extortion," a statutory term, already accompanies it. ("Extort" is defined as "to obtain from a person by force or undue or illegal power of ingenuity." *Id.* at 406). To the extent that the term "loansharking" is used to described "criminally usurious loans" the term is prejudicial because these activities are not necessarily violent or threatening. *See United States v. Hubbard*, 474 F.Supp. at 83 ("The Court finds that the use of such colorful words [e.g. infiltrate, burglary . . . ] to describe the allegations in the indictment is improper where less colorful and more accurate words would suffice."). The court is aware that other courts have found such colorful terms appropriate where the government will attempt to

prove their relevance to the counts charged, *United States v. Gambale*, 610 F.Supp. 1515, 1544 (D.Mass.1985), but the court finds for the above-stated reasons that in the context of this indictment the term "loansharking" serves no useful purpose. Therefore, the government may elect between striking the terms "loansharking" and "loanshark" or replacing them with a form of the more objective terms noted above.

The defendants have moved to strike the use of aliases in the indictment. The government has argued that the pleading and proof of aliases is necessary to identify the defendants' illegal actions. *United States v. Persico*, 621 F.Supp. at 861. Although this point was not specifically addressed at oral argument, the court assumes from the government's representations that it plans to introduce at trial such proof as to each alias used in the indictment. The court will request such a representation on the record from the government when the government next makes a pre-trial appearance before the court. The defendants' motion is denied without prejudice to their right to renew the motion if the government fails to make such a representation, or if the government fails to introduce such proof in the presentation of its case at trial. *Id.* at 861.

**(4) "[A]nd with others" and "and others" and "and other criminal means"**

At oral argument, defendants moved to strike the terms "and with others" and "and others" and "and other criminal means." *See e.g.* counts 30, 37. These types of terms "may encourage the jury to draw inferences that

the defendants are believed to be involved in (illegal) activities not charged in the indictment". *Hubbard*, 474 F.Supp. at 82; *see also* DeFabritus, 605 F.Supp. at 1547; *Brighton*, 435 F.Supp. at 230-31 (striking "among others") (the government may not use the indictment to "persuade the jury that the crime alleged has great and hidden implications") (footnote omitted). The terms "and with others" and "and others" and "and other criminal means" are to be struck from the indictment. In conclusion, the court notes that by striking the language described above, it does not foreclose the government from presenting any proof relevant to the charges at trial. *See e.g. DeFabritus*, 605 F.Supp. at 1547. These alterations do not broaden or materially alter the charging terms of the indictment. *United States v. Atisha*, 804 F.2d 920, 927 (6th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 955, 93 L.Ed.2d 1003 (1987); *United States v. Dawson*, 516 F.2d 796, 804 (9th Cir.), *cert. denied*, 423 U.S. 855, 96 S.Ct. 104, 46 L.Ed.2d 80 (1975). Defendants' motion to strike surplusage is granted in part and denied in part.

### D. Defendant Farone's Motion to Dismiss Counts 1 and 3

Defendant Farone argues that RICO counts 1 and 3 against him must be dismissed for failure to plead a pattern of racketeering. A "pattern of racketeering activity" requires at least two acts of racketeering activity. 18 U.S.C. § 1961(5). Farone is indicted under five counts other than the RICO counts (28, 30, 31, 33, 34). Count 28 alleges extortion related to a 1.25 million dollar purchase of "cut-out" records from MCA Records, Inc. ("MCA

transaction"), in violation of 18 U.S.C. § 894. Counts 30 and 31 allege the making of extortionate extensions of credit and the collection of such credit pertaining to seven individuals, including a $50,000 credit to John LaMonte. Counts 33 and 34 allege interference with commerce by threats or violence by means of extortion in the MCA transaction and usurious interest payments on the $50,000 LaMonte loan. The "Pattern of Racketeering-Racketeering Acts" chart in the indictment lists multiple counts with each act. The acts relevant to Farone are associated with the counts indicated as follows: Act 17-counts 28, 33, 34; Act 18-counts 30, 31. The test for determining whether two acts constitute a pattern has been succinctly articulated as follows:

> RICO "pattern" requires separate criminal transactions or events, but all these acts can comprise one fraudulent scheme and still form a "pattern" provided that the transactions share common perpetrators, victims or motives, extend over a substantial period of time, and that the transactions do not simply involve ministerial acts.

*United States v. Freshie Co.*, 639 F.Supp. 442, 445 (E.D.Pa.1986), (*citing Graham v. Slaughter*, 624 F.Supp. 222, 224-25 (N.D. Ill.1985)). The *Freshie* court found that *Sedima* did not require two different criminal episodes. *Id.* (discussing *Sedima S.P. R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 3285 n. 14, 87 L.Ed.2d 346 (1985)) (The *Sedima* discussion of the RICO legislative history points out that a mere showing of two acts is not sufficient. Instead, the Court requires a showing of "continuity plus relationship." "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or

similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e)."). In applying *Sedima*, the second circuit has stated that "when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise . . . ," the *Sedima* requirement is met. *United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir.1986). These two transactions allegedly share common perpetrators, victims, and motive, and extend over a significant period of time. Therefore, they are plead properly under the two act pattern test articulated in *Freshie* and *Ianniello*.

Farone challenges the pattern of racketeering allegations against him on the grounds that he is only charged with a single act of extortion against John LaMonte. The court's review of the indictment shows this not to be the case. Count 28 is for extortion related to the 1.25 million dollar MCA transaction and Counts 30 and 31 pertain to a $50,000 extortionate extension and collection of credit from LaMonte.

In addition, counts 30 and 31 list six other extortion victims. A finding of guilt as to any one of these victims amounts to an act. The indictment includes all seven victims in the same RICO act and the same count, but a special verdict sheet accompanied by a jury instruction can elicit factual findings on each victim for each defendant named in the count. *United States v. Louie*, 625 F.Supp. 1327, 1339 (S.D.N.Y.1985), *appeal dismissed*, 787 F.2d 65 (2d Cir.1986). Defendants' challenge does raise the *possibility* that Farone could be convicted of two counts among 30 or 31, and 33, for the sole act of extorting or

conspiring to extort John LaMonte on an interest payment on the $50,000 loan. This assumes Farone would be acquitted on the MCA transaction allegation in counts 28, 33, and 34, and allegations under 30 and 31 pertaining to all alleged extortion victims except LaMonte. This possibility raises the question whether such convictions could support a pattern of racketeering count. Sufficient proof of an extortionate interest payment on the $50,000 loan to LaMonte could support a conviction on count 30 or 31, (extortionate extension of credit and collection) and count 33 (extortionate interference with commerce) because the "unit of prosecution" under each statute is different. *See United States v. Provenzano*, 334 F.2d 678, 684 (3d Cir.), *cert. denied*, 379 U.S. 947, 85 S.Ct. 440, 13 L.Ed.2d 544 (1964). However, it would not support a conviction of a RICO pattern. This would violate the *Sedima* continuity requirement designed to prevent "one transaction sliced into a series of facts." *Freshie*, 639 F.Supp. at 444. Such proof would not demonstrate acts which are "sufficiently differentiated," to make up a RICO pattern. *Id.* at 445. (*quoting Kredietbank, N.V. v. Joyce Morris, Inc.*, No. 84-1903, slip op. at 5 (D.N.J. January 9, 1986) [Available on WESTLAW, DCT database]). Therefore, a special verdict sheet will be necessary for counts 28, 29, 30, 31, and 34. Appropriate jury instructions will insure that, in the event of a RICO conviction, such conviction is supported by a unanimous jury finding of guilt on two separate acts. Counts 33 and 34 will require a special verdict sheet indicating whether a conviction is based either on the MCA transaction or the interest payment on the $50,000 loan. *Cf. United States v. Dansker*, 537 F.2d 40, 51 (3d Cir.1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977) (Where

defendants were indicted in a conspiracy count which was submitted to the jury on alternative theories (bribing of two different officials), and the court ruled that the government failed to prove bribery on one of the theories, a *general* verdict of guilty on the conspiracy count was vacated: "In the instant case, the possibility thus remains, albeit slim, that the jury found that the defendants engaged in a conspiracy to bribe Serota alone. . . .") (emphasis added). The indictment properly pleads a pattern of racketeering against Farone. Defendant Farone's motion is denied.

**E. Defendants' (Levy and Fisher) Motion to Dismiss Counts 33 or 34 as Duplicitous or in the Alternative to Force the Government to Elect Between Charges Alleged**

Counts 33 and 34 charge the same nine defendants with interference with commerce by threats or violence, 18 U.S.C. § 1951. Count 33 is a conspiracy count. Each count alleges that the means of such interference were related to the MCA transaction extortion and collection of usurious interest payments on separate loans. Defendants challenge each count on the basis of duplicity.

Duplicity is the joining in a single count of two or more distinct separate offenses. *United States v. Starks*, 515 F.2d 112, 116 (3d Cir.1975). The "unit of prosecution" under the Hobbs Act, 18 U.S.C. § 1951, is "interference with commerce." *Provenzano*, 334 F.2d at 685. The jury can base its determination on any one of the enumerated acts that the statute allows, (i.e. robbery, extortion, conspiracy) and that the indictment alleges. The fact that the government has conceded that Levy and Fisher "are not

to be alleged to be involved in the collection of the $50,000 loan," MOL of United States in Opposition at 43 n.*, is not grounds to dismiss either count. The counts contain other adequate allegations against Levy and Fisher.

At oral argument, defendant Canterino joined the motion and argued that a conviction under either count could not stand as to any defendant for which there is inadequate proof indicating involvement with the collection of the interest payments on the $50,000 loan. Canterino asserts that the government will not be able to prove that he was associated with the $50,000 loan. However, the government has only asserted that Levy and Fisher are not associated with the loan. MOL of United States. Canterino relies on the proposition of law that a conviction on a conspiracy count submitted to the jury on alternate theories cannot stand when there is inadequate proof on one of those theories. *See United States v. Tarnopol*, 561 F.2d 466, 474-75 (3d Cir.1977); *Dansker*, 537 F.2d at 51.

The alternate theories in the case at bar, as discussed by counsel at oral argument and apparent from the indictment, are (1) a theory based on the 1.25 million dollar MCA transaction, and (2) one based on the $50,000 loan to LaMonte. A special verdict sheet and jury instruction can ensure that the $50,000 loan not be considered against Levy and Fisher (and others if necessary). This will prevent the possibility of problems associated with duplicity. *United States v. Alsobrook*, 620 F.2d 139, 142 (6th Cir.), *cert. denied*, 449 U.S. 843, 101 S.Ct. 124, 66 L.Ed.2d 51 (1980); *Starks*, 515 F.2d at 116 (such problems include double

jeopardy, prejudice at sentencing and on appeal, conviction on less than a unanimous determination, and prejudice of evidentiary rulings). Therefore, defendants' motion is denied.

It became evident at oral argument that counsel for Levy, Fisher, and Canterino, are particularly concerned about the prejudicial effect of being associated with the alleged beating of John LaMonte on May 18, 1985. That alleged beating is the subject of count 32, which names only Vastola, Brocco, and Saka. Various defendants argue that the evidence will show this to be the only violent act carried out by defendants. Therefore, they wish to distance themselves from allegations of violent acts. Counts 33 and 34 link the $50,000 loan to LaMonte with the 1.25 million dollar extortionate MCA transaction involving LaMonte, as an alternate factual basis for an 18 U.S.C. § 1951 conviction. However, the court notes that the nine defendants named in counts 33 and 34 are also named in a number of other counts involving extortion. In any event, the court will not speculate on the probativeness of this evidence, nor the prejudicial effect of the evidence, at this time. The court is obligated to test the indictment against the defense challenges on the basis of those allegations contained on the face of the document. *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); *United States v. Boffa*, 513 F.Supp. at 471, 474. In doing so, the court finds that counts 33 and 34 are properly pled.

### F. Defendant Harris' Motion to Dismiss Counts 41, 48, and 75 as Insufficient Pleadings and For a Bill of Particulars

Defendants Harris is indicted in three counts: count 41, conspiracy to commit wire fraud pertaining to a

"bust-out scheme"; count 48, conspiracy to commit fraud pertaining to use of Western Union authorization code; and count 75 substantive fraud pertaining to use of an authorization code. Defendant moves for dismissal, arguing that the indictment fails to provide adequate notice to enable him to prepare a defense.

Allegations in a conspiracy count need not be stated with the specificity required of a substantive count. *See e.g., United States v. Clark*, 649 F.2d 534, 539 (7th Cir.1981). The court is sufficient if it pleads the statutory language and contains an adequate statement of an overt act to carry out the conspiracy. *United States v. Sterkel*, 430 F.2d 1262, 1263 (10th Cir. 1970). Only one member, not each member, of the conspiracy need commit an overt act. *United States v. Flaherty*, 668 F.2d 566, 580 n.4 (1st Cir.1981). Counts 41 and 48 adequately describe a conspiracy in violation of 18 U.S.C. § 1343 and include the required listing of an overt act. They also include a full statement of all the elements necessary to constitute the offense. *Russell v. United States*, 369 U.S. 749, 765, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962). Wire fraud, 18 U.S.C. § 1343, requires the existence of a scheme to defraud by means of false pretenses and the use of interstate wire communications in furtherance of the scheme. *United States v. Brien*, 617 F.2d 299, 307 (1st Cir.) *cert. denied*, 446 U.S. 919, 100 S.Ct. 1854, 64 L.Ed.2d 273 (1980). Conspiracy, 18 U.S.C. § 371, requires the showing of an agreement to commit a crime. *United States v. Borelli*, 336 F.2d 376, 384 (2d Cir.1964), *cert. denied*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965). Count 41, ¶4, articulates Harris' specific role in the "bust-out" scheme, to attend trade shows and place orders intending not to pay for the orders. The

count, at ¶1, also alleges an agreement among five conspirators and describes a scheme to defraud. Count 48 alleges a scheme to defraud Western Union Telephone subscribers, a time frame in which the scheme was enacted, and a list of conspirators. In order to prove a violation by Harris in counts 41 and 48, the government must show Harris was a knowing participant in the conspiracy. *United States v. Abrams*, 539 F.Supp. 378, 383 (S.D.N.Y.1982). Count 75 specifically identifies Harris' alleged substantive Western Union crime. As a matter of pleading, the indictment is adequate on all three counts. *Roberts v. United States*, 226 F.2d 464, 466 (6th Cir.1955); *cert. denied*, 350 U.S. 935, 76 S.Ct. 307, 100 L.Ed. 817 (1956). However, the court finds in its discretion that the defendant is entitled to a more detailed factual description of his alleged role in the bust-out and Western Union conspiracies in order to avoid prejudicial surprise at trial. *United States v. Burgio*, 279 F.Supp. 843, 846 (S.D.N.Y.1968). Defendant's motion to dismiss is denied. His motion for a bill of particulars as to counts 41 and 48 is granted, as incorporated into the bill of particulars ruling at part IV-F of this opinion.

### G. Defendant Majuri's Motion to Dismiss Counts 3 and 98

Majuri is indicted in four counts: count 3, RICO conspiracy; counts 98 and 99, gambling conspiracy and gambling; and count 108, possession of firearms. At oral argument Majuri argued for dismissal of the RICO conspiracy count. Majuri points out that neither of the "substantive" RICO counts, pattern of racketeering and collection of unlawful debt (which are incorporated by

reference into the RICO conspiracy count), so much as mentions Majuri's name.

The conspiracy count is sufficient if it pleads the statutory language and contains an adequate statement of an overt act. *Sterkel*, 430 F.2d at 1263. A RICO conspiracy defendant must only agree to the commission of the predicate acts and need not agree to commit those acts personally. *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.1985). "The element of knowingly and willfully combining, conspiring and agreeing to conduct and participate in the affairs of the enterprise is a sufficient allegation to withstand a motion to dismiss or sever." *United States v. Salerno*, No. 586 Cr. 245, slip op. at 11 (S.D.N.Y. March 10, 1987). In order to prove a violation the government must show Majuri was a knowing participant in the conspiracy. *United States v. Abrams*, 539 F.Supp. at 383. The indictment adequately pleads the conspiracy. The fact the Majuri is not indicted under counts 1 and 2 is not a fatal flaw to his being named in count 3. However, the indictment lacks enough particularized information to allow Majuri to do pretrial investigation in support of a defense to this court. *Burgio*, 279 F.Supp. at 846. The motion to dismiss count 3 is denied. The motion for a bill of particulars as to count 3 is granted, as incorporated into the bill of particulars ruling at part IV-F of this opinion.

Majuri also challenges count 98, arguing that it charges multiple conspiracies instead of a single conspiracy. Count 98 on its face charges only a single conspiracy. The allegation is of a single agreement involving multiple offenses. *United States v. Maker*, 751 F.2d 614, 625 (3d Cir.1984), *cert. denied*, 472 U.S. 1017, 105 S.Ct. 3479, 87

L.Ed.2d 614 (1985); *Boffa*, 513 F.Supp. at 474. The ultimate question of whether there was a single conspiracy, multiple conspiracies, or no conspiracy at all, will be resolved at trial. *United States v. Smith*, 789 F.2d at 200. Majuri's motion to dismiss count 98 is denied.

## III. MOTIONS TO SEVER

### A. The Severance Plan

The defendants move jointly for severance under Fed.R.Crim.P. 8 and 14, and several defendants file motions to sever individually (Levy and Fisher also rely on Rule 2 as an authority in support of severance). For the reasons stated below, the motions to sever are granted in part and denied in part. Rule 8 is not permissive; the rule requires severance as a matter of law based on the pleadings. *United States v. Somers*, 496 F.2d 723, 729 (3d Cir.), *cert. denied*, 419 U.S. 832, 95 S.Ct. 56, 42 L.Ed.2d 58 (1974). In a multi-defendant case, Rule 8(b) applies. 1 C. Wright, *Federal Practice and Procedure* Criminal 2d § 144 at 494 & n. 1 (*citing United States v. Perry*, 731 F.2d 985, 989 (D.C.Cir.1984)). Rule 8(b) has been read as independent and exclusive of Rule 8(a). Wright, § 144 at 495. Therefore, the "common scheme or plan language" of Rule 8(a), which is broader than the 8(b) language, is not applicable under Rule 8(b).

> When similar but unrelated offenses are jointly charged to a single defendant, some prejudice almost necessarily results, and the same is true when several defendants are jointly charged with a single offense of related offenses. Rule 8(a) permits the first sort of prejudice and Rule 8(b) the second. But the Rules do not permit

> cumulation of prejudice by charging several defendants with similar but unrelated offenses.

*Cupo v. United States*, 359 F.2d 990, 993 (D.C.Cir.1966), *cert. denied*, 385 U.S. 1013, 87 S.Ct. 723, 17 L.Ed.2d 549 (1967). Separate and unrelated conspiracies, not related as elements of a RICO enterprise, cannot be joined together in the same prosecutions. *See e.g. United State v. Weisman*, 624 F.2d 1118, 1129 (2d Cir.), *cert. denied*, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980) (if offenses are adequate to be plead as RICO predicate acts, they can be joined under Rule 8(b)).

Rule 14 allows the court in its discretion to serve on the basis of prejudicial joinder of defendants or offenses. A severance is not required merely because one would improve a defendant's chances of acquittal. *United States v. Rucker*, 586 F.2d 899 (2d Cir.1978). A defendant must show that joinder would result in a manifestly unfair trial. *United States v. Reicherter*, 647 F2d 397, 400 (3d Cir.1981).

The defendants have made a joint severance suggestion as follows:

> *Trial #1* Extortion/Loansharking Offenses (Counts 28-40)
>
> *Trial #2* frauds (Credit, Western Union, Insurance, Bankruptcy), and Copyright Infringement (Counts 41 & 97)
>
> *Trial #3* Gambling Offenses (Counts 98-106)

M.O.L. in Support of Defendants' Substantive Motions (this proposal omits counts 1-27 and 107-114). This proposal drew widespread support from various defense

counsel at oral argument. The government opposed any severance.

For the reasons stated below, the court will sever this matter into several separate trials. Trial of the RICO defendants will be severed from non-RICO defendants for purposes of case management. The non-RICO defendants will be tried in a series of separate trials under the requirements of Rule 8(b). The trials will include the following offenses:

*Severance Plan*

A. *Non-RICO Defendants*

1. Extortion – Counts 28, 33, 34. (Defendants Canterino, Levy, and Fisher)

2. Bust-Out Fraud – Counts 41, 46, 47. (Defendants Howard and Harris)

3. Western Union Telephone Fraud – Counts 48, 75, 80, 81, 82. (Defendants Howard, Harris, Brennan, Marino, and Sanzaro)

4. Insurance Fraud – Count 91. (Defendant Marino)

5. Gambling – Counts 98-106. (Defendants D'Alessio, Sr., D'Allessio, Jr., and Uris)

B. *RICO Defendants*

6. RICO enterprise charges and all charges against 10 defendants named in count 3 (counts 1-45, 48-74, 76-79, 83-106, and 111-114). Counts 107-110 to be tried in the second stage of a bifurcated trial. (Defendants Vastola, Brocco, Massaro, Farone, Martire, Saka, Stone, Santoni, Zito and Majuri)

7. Firearms charges against Majuri – Count 108. (Defendant Majuri)

**1. The RICO Trial**

Rule 8(b) allows for trial of all defendants "alleged to have participated in the same act or transaction or in the same series of acts or transactions." Wright, § 144 at 495; (citing *United States v. Kenny*, 645 F.2d 1323, 1344 (9th Cir.), *cert. denied*, 452 U.S. 920, 101 S.Ct. 3059, 69 L.Ed.2d 425 (1981); *United States v. Corral Martinez*, 592 F.2d 263, 268 (5th Cir. 1979)). Offenses linked to a common conspiracy may be joined together. *Smith*, 789 F.2d at 206. The second circuit has specifically held that RICO predicate acts in a pattern of racketeering activity may "constitute part of a 'series of acts or transactions constituting an offense' within the meaning of Rule 8(b)." *Weisman*, 624 F.2d at 1129. Joinder of all the RICO defendants will allow the government to develop the entire RICO conspiracy as charged. *United States v. Provenzano*, 688 F.2d 194, 199 (3d Cir.), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 492, 74 L.Ed.2d 634 (1982). To force the government to try some of the alleged criminal activities separately from others alleged to be part of the same RICO enterprise would prevent the government from prosecuting the type of crimes the statute was intended to combat. *Persico*, 621 F.Supp. at 854; *see also Turkette*, 452 U.S. at 583, 101 S.Ct. at 2528. The defense has also sought severance of various criminal activities on the theory that extortion and narcotics activities as alleged will have prejudicial spillover onto the other "white collar" activities alleged. The court does not accept this argument. All of the criminal activities, except the weapons offenses, are alleged to be affairs of the

enterprise. The court is confident that the jury will be able to compartmentalize the different types of criminal activities. *Dansker*, 537 F.2d at 62; *Persico*, 621 F.Supp. at 853; *see also United States v. Castellano*, 610 F.Supp. 1359, 1412-13 (S.D.N.Y1985) (denial of severance motion of defendants not associated with alleged murder). The indictment properly pleads a RICO enterprise conspiracy, thus all defendants so named and offenses alleged to be affairs of the enterprise may be joined under Rule 8(b). *Somers*, 496 F.2d at 729 ("A Rule 8(b) motion is addressed to the pleadings, and not to the proof subsequently adduced.") As to the alleged prejudicial nature of the extortion and narcotics evidence to be presented to the jury, the court has a continuing obligation under Rule 14 to evaluate the prejudicial effect of such evidence and take any necessary steps. Wright, § 144 at 521, (*citing Schaffer v. United States*, 362 U.S. 511, 514, 80 S.Ct. 945, 947, 4 L.Ed.2d 921 (1960)).

**a. Case Management**

The severance of the RICO defendants from the non-RICO defendants is necessary for case management reasons. The court notes that a severance of RICO from non-RICO defendants will in no way prejudice the government in its efforts to enforce the RICO statute. *See United States v. Persico*, 621 F.Supp. at 854 (goal of statute is to prosecute organized crime). All criminal activities and defendants alleged to be part of the criminal enterprise will be tried in one joint trial. Other courts have employed severance on manageability grounds in similar multi-defendant cases, although the efficiency outcome of such

plans has yet to be demonstrated. *See* M.O.L. in Opposition at 76-77 (discussing *United States v. Castellano*, transcript at 13, September 9, 1985) (remarks of Judge Duffy) and *United States v. Gallo*, No. 86-452, slip op. (E.D.N.Y. July 8, 1986) (Defendants' Exhibit D) (Government contends Judge Weinstein severed on case management grounds).

The court, in its discretion, could allow for the joinder of the non-RICO defendants with the RICO defendants. *See e.g., United States v. Castellano*, 610 F.Supp. 1359, 1396 (S.D.N.Y.1985). The court, however, recognizes that the present case is complicated both by the number of different types of criminal activities alleged and the number of defendants charged. It is likely that severance will lead to some redundancy in the presentation of evidence. However, there are also efficiencies associated with severance. It will not be necessary for the non-RICO defendants, who are named in a relatively small number of counts, and their counsel to sit through a trial estimated to take 12 months, when the proof that concerns them could be put forward in a matter of days. The possibilities of delay caused by scheduling problems of counsel and extended cross-examination in a 21-defendant trial will be somewhat reduced by the severance. The specter of managing 21 defendants and their counsel also presents difficulties to the court system in terms of providing adequate physical space. The system would be strained to provide a courtroom large enough to hold all these people and to provide rooms for consultation among counsel.

The confinement of RICO charges to one trial will assist each of the several juries in compartmentalizing the

evidence put before it. The court recognizes that the total time spent in court on the several trials, mandated by this severance plan, may equal the 12-month estimate of the 21-defendant trial. However, use of several different juries, each for a shorter duration of time, is an important factor in increasing the efficiencies and the abilities of each jury to reach a fair result. The inevitable delays caused by illness and scheduling problems of jurors will become much more manageable in the context of shorter trials. The likelihood of obtaining a diverse cross section of the population in the selection of a jury is heightened by greater availability of jurors to serve in trials that do not interrupt employment as severely as would the estimate one year interruption in the case at bar. An exceedingly long trial mitigates against the jury's ability to devote its full attention to the trial and to properly evaluate and recollect all the evidence. Of course, in the exceptional case, a lengthy trial cannot be avoided and is in fact the best mechanism to achieve a fair trial for all parties. However, the indictment in the case at bar does not present the exceptional case. Based upon considerable experience in presiding over jury deliberations, this court is confident that the severance plan will better enable each jury to play its central role in achieving the goal of a fair trial.

### b. Firearms Charges

#### i. Title 18 U.S.C. App. § 1202

The court is concerned about the prejudicial effect of a trial that includes firearms charges which require proof of previous felony convictions. Title 18 U.S.C. App. 1202(a)(1) makes possession of firearms by a previously

convicted felon an offense. Counts 107-110 charge various RICO defendants with this offense. The court finds that presenting evidence or even the mere fact of a prior felony conviction to a jury would be prejudicial. The court recognizes the evidence may be "otherwise admissible," and that some courts employ such a test to determine if prior conviction evidence may come in. *See United States v. Sanko*, 787 F.2d 1249, 1251 (8th Cir.1986); *United States v. Begun*, 446 F.2d 32, 33 (9th Cir.1971). However, to avoid the possibility of prejudice resulting from admission of such evidence, the court will conduct a two-stage trial. The first stage of the trial will consist of the presentation of the entire RICO case, jury deliberations, and a verdict, on all the counts except 107-110. The second stage will include the trial of counts 107-110, those counts requiring proof of a prior conviction under 18 U.S.C. App. § 1202(a)(1). this approach, which is suggested as a possible solution to the prior conviction prejudice problem in the government's brief, M.O.L. in Opposition 88, has been employed by the District of Minnesota and cited with approval by the third circuit *in dicta*. *United States v. Busic*, 587 F.2d 577, 585 (3d Cir.1978), *rev'd on other grounds*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980) (*citing United States v. Franke*, 331 F.Supp. 136 (D.Minn.1971)). This court's bifurcation ruling pertains only to the preclusion of submitting prior conviction evidence for the purpose of proving § 1202 offenses, and in no way serves as a ruling on the question of admitting prior conviction evidence for any other purpose.

**ii. Title 26 U.S.C. § 5861**

The firearms charges under 26 U.S.C. § 5861 (possession of unregistered and unidentified firearms (counts

111-114) need not be tried separately from the bulk of the charges, since they do not require proof of a prior conviction. Firearms charges are recognized to be related to narcotics activity to the extent necessary to allow joinder of such charges under Rule 8(b). *Sanko*, 787 F.2d at 1251 (proof of firearms possession admissible in a narcotics trial as evidence that motive of possession is related to narcotics activity); *United States v. Milham*, 590 F.2d 717, 721 (8th Cir.1979) (judicial notice of relationship between narcotics dealing and firearms); *Begun*, 446 F.2d at 33 (9th Cir.1971) (firearms evidence would be admissible on narcotics charges).

**2. Majuri Firearms Trial**

Defendants Vastola, Brocco, and Massaro, are all charged with firearms offenses and narcotics offenses. Majuri is also charged with a firearms offense, count 108. Majuri is not specifically indicted for narcotics or extortion, but is named in two gambling counts and the RICO conspiracy count. The RICO conspiracy count does not specifically identify firearms with the enterprise as charged. The court could, within its discretion, allow joinder of all firearms charges against RICO defendants, because the enterprise is alleged to be involved in narcotics activity. *See, e.g. Sanko*, 787 F.2d at 1251. However, that would be an unfair extension of the *Sanko* line of cases. The firearms charges against Majuri appear on the face of the indictment to be totally unrelated to narcotics activity. Therefore, in order to be sure to avoid prejudice to Majuri, the court, under the authority of Rule 14, will conduct a separate trial on the firearms charges against Majuri. *United States v. Boscia*, 573 F.2d 827, 833 (3d Cir.),

*cert. denied*, 436 U.S. 911, 98 S.Ct. 2248, 56 L.Ed.2d 411 (1978). In conclusion, with the exception of the Majuri firearms count, all RICO defendants will be tried on all counts charged in a joint bifurcated trial. The first stage will include all counts charged except counts 107-110; counts 107-110 will be tried in the second stage. In addition, Majuri's firearms count will be tried separately.

### 3. Other Individual RICO Defendants' Motions to Sever

#### a. Majuri

The court notes that two of the RICO defendants, Majuri and Stone, move for a severance. Majuri argues that unless he is tried in a single trial, he will be deprived of his right to call several co-defendants as witnesses. Four factors are to be considered by the court in evaluating this motion: (1) likelihood of co-defendant's testifying; (2) degree to which such testimony may be exculpatory; (3) degree to which testifying co-defendant would be impeached; and (4) judicial economy. *Boscia*, 573 F.2d at 832. More than the showing of a possibility that a co-defendant will testify is required. *Provenzano*, 688 F.2d at 198. Majuri has alluded to co-defendant affidavits, but none have been provided in support of the motion. The alleged testimony of co-defendants, although contradictory to the government's case, would not be of a highly exculpatory nature, nor would it be beyond impeachment. *See Boscia*, 573 F.2d at 832; *but see United States v. Ditizio*, 530 F.Supp. 175, 177 (E.D.Pa.1982) (statements against penal interest to be made by co-defendants are adequate grounds for severance). Upon considering all of the *Boscia* factors, the court denies Majuri's motion. The

motion is not supported by affidavits and the court finds that it would be highly speculative to sever on the basis of such limited information.

### b. Stone

Defendant Stone seeks an indefinite continuance or severance on the basis of severe health risks of trial. The court will reserve opinion on this motion pending a report from counsel following a court-ordered examination of Stone by an independent physician.

### 4. Non-RICO Defendants' Motions to Sever

Defendant Sanzaro's motion to sever is mooted by the court's severance plan. Count 31 names Sanzaro as an extortion victim. Only RICO conspiracy defendants are named in count 31. Counts 48, 80-82, name Sanzaro as a defendant in Western Union Telephone wire fraud and conspiracy. His defense is in no way antagonistic to the defense of the Count 31 defendants. Even if they had not been severed, Sanzaro could not show what is required in order to obtain severance for mutually antagonistic defenses. *See Provenzano,* 688 F.2d at 193 (such defenses must be irreconcilable and mutually exclusive); *United States v. Crawford,* 581 F.2d 489, 491-92 (5th Cir.1978) (Mutually antagonistic defenses found to exist where the sole defense of each was the guilt of the other.).

The motions to sever by non-RICO defendants for the most part are mooted by the court's severance plan; to the extent any motion is not moot, it is denied.

### 5. Order of Trials and Continuance Motion

The court suggests that the trials proceed in the order indicated above at part III-A. This order is based on the numerical order of counts in the indictment. The RICO trial is scheduled after the non-RICO trials due to the unavailability of Michael Rosen, Esquire, counsel for defendant Vastola. *See United States v. Gaggi*, No. 555 84 Cr. 63, order (S.D.N.Y. August 13, 1987). All counsel are to appear on September 8, 1987, at 9:30 a.m. to discuss the order of trials in this matter. Counsel should be prepared to make realistic time estimates for each trial. The first non-RICO trial will commence on October 13, 1987, and will be followed by all other non-RICO trials. The RICO trial will commence on March 7, 1988, assuming the availability of Mr. Rosen.

The motion by Mr. Rosen on behalf of defendant Vastola for an extension beyond the above-indicated dates is denied. The court has reviewed the expert report obtained by defense counsel and recognizes that the quantity of tape recordings to be screened is voluminous; however, the court is confident that an organized effort by defense counsel, along with the seven-month continuance of the RICO case, will allow for full and proper preparation of the defense. The original indictment was returned September 19, 1986. RICO defendants had nine months to prepare for pretrial motions, and will have seven months to prepare for trial. The motion for a continuance beyond the dates listed above is denied.

## IV. MOTIONS FOR PRETRIAL HEARINGS AND DISCOVERY

### A. Defendants' (Levy and Fisher) Motion for Brady Material

Defendants Levy and Fisher are indicted in three counts of the indictment: count 28, 18 U.S.C. § 894 (extortion conspiracy), and counts 33 and 34, 18 U.S.C. § 1951 (interference with commerce by extortion conspiracy). These counts pertain to collection of an extension of credit to John LaMonte d/b/a Out of the Past, Ltd., in connection with the MCA transaction and collection of usurious interest payments on a $50,000 loan to LaMonte. The defendants' *Brady* request seeks "information indicating that Morris Levy and Howard Fisher were extorted and controlled by certain named and unnamed members of the Genovese crime LCN family." Notice of Motion to compel Discovery, Exhibit D (Letter dated February 10, 1987). Defendants allege such material to include: (a) writings, recordings, and photographs, (b) names, addresses, and telephone numbers of people with knowledge of the extortion; and of (c) confidential informants (CI-1 through CI-13) already named in affidavits in support of wiretap applications; (d) agents' notes; (e) relevant audio and video tapes; and (f) relevant notes, memos and reports. The factual basis of the request is derived from material already disclosed to the defense which includes affidavits in support of wiretaps in several districts: Southern district of New York, Northern District of New York, Eastern District of New York, and District of New Jersey. *See* Defendants' Exhibits H-L.

These affidavits contain information indicating that confidential informants had information regarding the relationship between Levy and La Cosa-Nostra ("LCN"), and the relationship between John LaMonte and the government. It appears that these wiretaps were conducted pursuant to a government investigation of the Genovese family. The affidavits show confidential informants had knowledge of Levy's activities and believed that he was under the control of a Vincent Gigante of the Genovese family, that his life had been threatened, and that he had tried to sever his relationship with the Genovese family. The affidavits also show that the informants believed that Levy's brother had been killed some 20 years ago in a mistaken attempt on Levy's life. The affidavits also indicate that Levy had dealings both with John LaMonte and the Genovese family over an extended period of time, including 1984 and 1985. The affidavits providing this information refer to five confidential informants: CI-2, 3, 7, 8, and 9. Affidavit of Leon Borstein, ¶¶ 30-40, filed April 24, 1987; *see also* Defendants' Exhibit H, ¶ 64. The government does not question the genuineness of these threats to Levy. It is the affidavits of government agents which articulate the threats. Defendants seek the requested information (a) to establish defenses including duress, entrapment, and due process outrageous conduct, (b) to support a dismissal motion based on grand jury misconduct, and (c) to support a severance motion based on incompatible defenses. The government opposes the *Brady* motion.

*Brady* "is not a discovery rule but a rule of fairness and minimum prosecutorial obligation." *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir.1984) (citation omitted).

It requires the disclosure of exculpatory evidence. "Exculpatory evidence includes material that goes to the heart of the defendant's guilt or innocence as well as that which might well alter the jury's judgment of credibility of a crucial question of a witness." *Id.* at 260. The government has a continuing duty to identify exculpatory material and provide it to the defense. *Pennsylvania v. Ritchie*, ___ U.S. ___, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). The government's determination as to the existence of *Brady* material is subject to review under a constitutional error standard. *United States v. Agurs*, 427 U.S. 97, 111-14, 96 S.Ct. 2392, 2401-403, 49 L.Ed.2d 342 (1976).

The Assistant United States Attorney ("AUSA") has represented to the court that he has not personally reviewed the investigations associated with the affidavits containing information on Levy, nor has he had detailed discussions with other government agents or attorneys who are intimately familiar with those investigations. Therefore, this court will employ its "Elizabeth Wiretaps" approach, used on a prior occasion in this case, and order the AUSA to review the government investigations concerning Levy for *Brady* information and to report its findings to the court within 15 days of the date of the attached order. *See United States v. Vastola*, No. 86-301, letter opinions (D.N.J. May 21, 1987; June 25, 1987).

The court adds the following guidance to the AUSA in its investigation and development of a report to the court. The defendants have not made an adequate showing to justify the release of the identity of confidential informants. *United States v. Jiles*, 658 F.2d 194, 197 (3d Cir.1981), *cert. denied*, 455 U.S. 923, 102 S.Ct. 1282, 71 L.Ed.2d 465 (1982). For the purposes of this motion, the

court finds that the defendants have not shown that the informant's identities are essential to a fair determination of a cause. *Roviaro v. United States*, 353 U.S. 53, 60, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957). The ultimate determination of the viability of the defendants' duress and entrapment defense will be made at trial. *See United States v. Ciambrone*, 601 F.2d 616, 626 (2d Cir.1979); *United States v. Glaeser*, 550 F.2d 483, 487 (9th Cir.1977). In the meantime, this court will not disturb the government's confidential informant privilege, *Roviaro*, 353 U.S. at 59, 77 S.Ct. at 627, on the basis of highly speculative assertions that the confidential informants possess exculpatory material not already in the record. *Jiles*, 658 F.2d at 198-99. In the event that the government calls a confidential informant as a witness, information pertinent to veracity must be made available at or shortly before appearance at trial. *United States v. Higgs*, 713 F.2d 39, 44 (3d Cir.1983), *cert. denied*, 464 U.S. 1048, 104 S.Ct. 725, 79 L.Ed.2d 185 (1984); *see also United States v. Dansker*, 565 F.2d 1262, 1264 (3d Cir.1977), *cert. dismissed*, 434 U.S. 1052, 98 S.Ct. 905, 54 L.Ed.2d 805 (1978) (where the credibility of a key witness was placed in question by written affidavits, an evidentiary hearing should be conducted to determine if *Brady* material was being withheld).

The court also notes that defendants have called to the court's attention certain occurrences in the case of *United States v. Canterine*, No. 87-57 (S.D.N.Y.), which defendants assert have an impact on this case. Supplemental Affidavit In Support of Motion to Compel at 4-5 and Exhibit R (July 10, 1987). Defendants allege that agents in the *Canterine* case who withheld *Brady* information from the defense are also involved in the *Vastola*

investigation. The AUSA is ordered to investigate this allegation and file a separate *ex parte* report with the court, identifying these agents and describing the roles, if any, of these agents in the *Vastola* investigation. Such report should be filed within 15 days of the attached order.

In conclusion, defendants' motion to compel is denied, and the government is ordered to review the above described material and file the requested reports.

### B. Defendants' Joint Motion for Pretrial Proffer Of A Single Conspiracy

Defendants seek an order requiring the government to make a pretrial proffer that one RICO conspiracy (and not multiple RICO conspiracies) is charged in the indictment. The government opposes this request, relying on the proposition that the good faith allegation of a single conspiracy in the indictment allows the government the opportunity to proceed to trial on that charge. *Somers*, 496 F.2d at 729-30; *see also Maker*, 751 F.2d at 626; *United States v. Galiagher, II*, 602 F.2d 1139, 1142 (3d Cir.1979), *cert. denied*, 444 U.S. 1043, 100 S.Ct. 729, 62 L.Ed.2d 728 (1980) (citation omitted) ("[T]he sufficiency of an indictment 'may not be properly challenged by a pretrial motion on the ground that it is not supported by adequate evidence.' "). District courts have specifically applied this principle to RICO conspiracy indictments. *Persico*, 621 F.Supp. at 857; *Boffa*, 513 F.Supp. at 473. However, as the defense points out, some courts have undertaken pretrial scrutiny of the indictment either to assist the court in controlling the case or to prevent the prejudicial effect of

misjoinder of a RICO conspiracy count. *See Castellano*, 610 F.Supp. at 1397 ("[L]imited [pretrial] review enables a court to protect persons from the enormous burdens and risks of a major trial, without significantly or improperly limiting the government's right to prosecute."); *United States v. Gallo*, No. 86-452 (Tr. 27) ("I can't rule on these things without, . . . getting an analysis of what your theory is, what you plan to prove and what you're going to use to prove it."). *But see United States v. Donsky*, 825 F.2d 746, 751-52 (3d Cir.1987) (footnote omitted) ("We do not, however, believe that the district court's decision in this case, which required proof delineating what the government intended to prove at trial as to each of the various defendants, was proper."). The court is sensitive to the concerns that fueled the pretrial scrutiny of the indictment in the above noted cases. However, the court finds that a pretrial proffer or hearing would be premature. In the event that the government's case is insufficient as to the proper allegations and proof of a single RICO conspiracy or involvement of a particular defendant, the court will entertain appropriate motions at the conclusion of the government's case. Defendants' motion is denied.

**C. Defendants' Joint Motion for a James Hearing**

Defendants also seek a *James* hearing in order to ascertain if statements of co-conspirators (Fed.R.Evid. 801(d)(2)(E) are admissible.

> A co-conspirator statement may be admitted under Fed.R.Evid. 801(d)(2)(E) if it meets three

> conditions: (1) there must be independent evidence establishing the existence of the conspiracy and connecting the declarant and defendant to it; (2) the statement must have been made in furtherance of the conspiracy; and (3) it must have been made in the course of the conspiracy.

*United States v. Ammar*, 714 F.2d 238, 245 (3d Cir.), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983) (citation omitted).

A pretrial hearing to establish such a foundation for a co-conspirator statement is a matter within the trial court's discretion. *Id.* at 246. The third circuit, under certain circumstances, has allowed such statements to be admitted subject to the government making the required showing before the close of its case. *United States v. Continental Group, Inc.*, 603 F.2d 444, 456-57 (3d Cir.1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980). The *Continental* court found that such a procedure should be used sparingly due to the danger of prejudice, but that its application was particularly appropriate in multi-defendant conspiracy cases. *Id.* This court will follow the procedures outlined in *Continental*. To the extent feasible, the government will be required to make the *Ammar* showing prior to submission of such statements. However, in limited circumstances, the court will allow for the admission of co-conspirator statements pending a final threshold determination of conspiracy by the court before sending the case to the jury. *See e.g. Ammar*, 714 F.2d at 247. Defendants' motion is denied.

### D. Defendants' Joint Motion for Pretrial Hearings on Evidentiary Material (Prior Conduct, Prior Convictions, Bad Acts)

Defendants seek an order requiring that the government disclose the evidentiary material it will use at trial

under Fed.R.Evid. 403, 404(b), 608, 609(e). The question presented by the motion calls for the balancing of the prejudicial effect of the evidence against the probative value of the evidence of prior conduct, prior convictions, or bad acts. *Luce v. United States*, 469 U.S. 38, 41, 105 S.Ct. 460, 463, 83 L.Ed.2d 443 (1984). Such balancing is most effectively done at trial when such evidence can be evaluated in the factual context of the government's case and the defense put forward. *Id.* at 41, 105 S.Ct. at 463. This court will deal with these issues outside of the presence of the jury as they arise. It would be unduly speculative to try to resolve them without developing the factual context of the case. *See generally United States v. Bianco*, 419 F.Supp. 507, 508 (E.D.Pa.1976), *aff'd mem.* 547 F.2d 1164 (3d Cir.1977). The joint motion of the defendants and all individual motions for pretrial evidentiary hearings are denied.

### E. Defendants' Joint Motion for Pretrial Discovery (Witness List, Statements of Non-Testifying Witnesses, Grand Jury Information)

Defendants have made a broad motion for various types of information to be disclosed by the government. Some of these requests have been treated above, (i.e. prior conduct, prior convictions, bad acts). Specifically, the defendants seek production of a witness list, statements of non-testifying witnesses, and grand jury information. The government is obligated to disclose information under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); and the Jencks Act, 18 U.S.C. § 3500. No evidence has been

brought before the court that the government is not meeting or will not meet these continuing obligations. With regard to the specific requests for a witness list and statements of non-testifying witnesses; neither is required to be disclosed as *Brady* material. *See United States v. DiPasquale*, 740 F.2d 1282, 1294 (3d Cir.1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1226, 84 L.Ed.2d 364 (1985) (witness list); *United States v. Fischbach and Moore, Inc.*, 576 F.Supp. 1384, 1390 (W.D.Pa.1983) (recorded statements of alleged co-conspirators); *United States v. Kenny*, 462 F.2d 1205, 1212 (3d Cir.), *cert. denied*, 409 U.S. 914, 93 S.Ct. 233, 34 L.Ed.2d 176 (1972) (witness statements discoverable under Jencks Act). The defense seeks disclosure of the identity of confidential informants. No specific need for disclosure has been demonstrated. *United States v. Jiles*, 658 F.2d 194, 197 (3d Cir.1981), *cert. denied*, 455 U.S. 923, 102 S.Ct. 1282, 71 L.Ed.2d 465 (1982). At oral argument, the defense suggested that information pertinent to John LaMonte should be disclosed now because "this is an impeachment case." The court will require that such information be released pursuant to the normal procedure of the Jencks Act in this district. This requires release in time for effective cross-examination. The government is encouraged to release such information on or before the first day of trial.

The joint defense motion and defendant Vastola individually seek disclosure of grand jury materials, or in the alternative, an *in camera* review of the grand jury minutes. There exists a long established policy of secrecy of grant jury proceedings. *See Pittsburgh Plate Glass Co. v. U.S.*, 360 U.S. 395, 399, 79 S.Ct. 1237, 1240, 3 L.Ed.2d 1323 (1959). However, the trial court can invade the secrecy of the

proceedings in the interests of justice where a defendant demonstrates "a particularized need." *Id.* at 400, 79 S.Ct. at 1241. The defense request for disclosure of unauthorized persons, impanelment date, and other procedural details, is not supported by such a demonstration. A "presumption of regularity" attaches to the proceedings, and the defense has provided nothing to the court, such as reliance on perjured testimony, to disturb the secrecy. *United States v. Vaughn*, 510 F.Supp. 206, 209 (D.N.J.1981). Defendant Vastola's argument that there could be no evidence presented to the grand jury to support his indictment on narcotics charges is also without merit. This court does not know the full scope of the evidence presented to the grand jury, nor need it inquire into such evidence at this time. *United States v. Louie*, 625 F.Supp. 1327, 1342 (S.D.N.Y.1985), *appeal dismissed*, 787 F.2d 65 (2d Cir.1986) (argument that facts do not support the charges is premature). If inadequate evidence of narcotics activity exists, the narcotics counts can be challenged by a motion to dismiss. The motions to disclose to conduct *in camera* review of the grand jury materials are denied.

### F. Defendants' Joint Motion For A Bill Of Particulars

The joint defense motion seeks a 110-item bill of particulars. The purpose of a bill of particulars is "to inform the defendant of the nature of the charges against him, to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense." *United States v. Addonizio*, 451 F.2d 49, 54 (3d Cir.1971), *cert.*

*denied*, 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812 (1972). A motion for a bill of particulars is a discretionary matter for the trial court. *Id.* Defendants' request was denied in its entirety by the government.

The defense has categorized its request into four groups: (1) information about when, where and by whom the alleged criminal acts or managerial acts relevant to the alleged enterprise were committed; (2) information about the identity of non-named participants in these acts; (3) information about uncharged overt acts or other uncharged criminal conduct which the government will seek to prove at trial; and (4) information necessary to determine whether the indictment is proper. Some of what is being sought in category (3) has already been asked for and denied in the context of other motions (e.g., prior conduct, prior convictions, bad acts). In addition, the request for information necessary to determine the adequacy of the indictment, category (4), has been denied for the most part based on other rulings made in this opinion. The court has found in large part that the indictment is adequate. Pleading of the statutory language that provides basic notice of the culpable behavior is sufficient.

Nevertheless, the court finds that defendants are entitled to more detailed information on some of the counts charged. They are entitled to "central facts," not unlimited discovery. *United States v. Johnson*, 524 F.Supp. 199, 207 (D.Del. 1981), *rev'd on other grounds*, 690 F.2d 60 (3d Cir.1982), *cert. denied*, 459 U.S. 1214, 103 S.Ct. 1212, 75 L.Ed.2d 450 (1983). To the extent that the government is able to do so, the precise date and place of each event alleged in the indictment should be provided. *United*

*States v. Holman*, 490 F.Supp. 755, 762 (E.D.Pa.1980). In addition, the names of all co-conspirators or participants in the alleged offenses should be provided, "except insofar as the Government can show, *in camera*, that such disclosures might endanger the safety of prospective witnesses." *Id.* The government is not obligated to provide uncharged overt acts and uncharged criminal conduct. *United States v. Armocida*, 515 F.2d 29, 55 (3d Cir.), *cert. denied*, 423 U.S. 858, 96 S.Ct. 111, 46 L.Ed.2d 84 (1975); *Johnson*, 524 F.Supp. at 207. These are not central facts to the offenses as charged. This ruling incorporates the granting of a bill of particulars as to defendants Harris and Majuri, discussed at II-F, G, of this opinion. Defendants' motion for a bill of particulars is granted in part and denied in part. Information is to be provided to the defense within 15 days of the date of the attached order; in the event that it is necessary for the government to make an *in camera* submission to the court, it shall be made within 10 days of the date of the attached order.

In conclusion, all motions for pre-trial hearings and compelled disclosure of discovery material, with the exception of the bill of particulars motion, are denied. The bill of particulars motion is granted in part and denied in part.

## V. MOTIONS TO SUPPRESS

### A. Individual Defendants' Motions To Suppress Fruits of Searches

Several defendants seek suppression of evidence under a theory that the relevant search warrants were not

supported by probable cause. The review of a magistrate's probable cause determination is not *de novo*, but rather deference is to be paid to the magistrate. *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983). The magistrate is to consider the particular factors of each case in determining if a "substantial basis" for probable cause exists. *Id.* at 238-39, 103 S.Ct. at 2332-33. Where a defendant demonstrates an inadequacy of probable cause, the appropriateness of applying the suppression mechanism must be evaluated under the requirements of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Under *Leon*, suppression is not required where "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Id.* at 920, 104 S.Ct. at 3419. Any one of the following conditions requires suppression under *Leon:* (1) where the affiant intentionally or recklessly misleads the magistrate; (2) where the magistrate abandons his or her objective judicial role; (3) where the affidavit is so lacking in probable cause that an officer could not reasonably rely on the warrant; (4) where the warrant utterly fails to meet particularization standards. *Id.* at 923, 104 S.Ct. at 3420; *see also United States v. Savoca*, 761 F.2d 292, 298 (6th Cir. 1985) (motel room search without sufficient probable cause upheld under *Leon;* "reasonably well-trained officer" could have concluded that probable cause was sufficient). Under these standards, the defendants' suppression motions challenging the search warrants and execution of such warrants are granted in part and denied in part as explained below.

### 1. Vastola Motion

Vastola challenges the probable cause finding in support of the search warrant of his home. The warrant identifies the objects of the search as follows:

> Fruits and instrumentalities of the crimes of extortion and mail and wire fraud including but not limited to cash received from extortion, records of loansharking and extortion, and a television set obtained by mail and wire fraud.

The court will first discuss the fruits of the mail and wire fraud and then the "fruits and instrumentalities of the crimes of extortion."

#### a. Fruits of Fire and Mail Fraud

The warrant lists only one item as a fruit or instrumentality of the mail and wire fraud: a television set. Vastola argues that Agent Mahoney made a material misrepresentation in regard to the television set by omitting language from the intercepted Brocco-Massaro conversation that placed the television in the Vastola home. *See* Affidavit of Special Agent John Mahoney, FBI, In Support of Application For Search Warrants, ("Mahoney Affidavit"). The court has reviewed the omitted language and finds that it is not material. It does indicate that a different television set was in the Vastola home than the one described in the language provided to the magistrate. However, the additional language does not undercut or negate the inference that Vastola possessed a stolen television set in his home, nor that the set was obtained pursuant to a fraudulent scheme. Paragraphs 68, 69, 81, and 82 of the Affidavit support this inference. The court

finds that the omission was neither material nor was it meant to deceive the magistrate. Therefore, defendant's request for a *Franks* hearing is denied, *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and the motion to suppress the television set is denied.

**b. Fruits of Extortion**

There is no doubt that the Affidavit supports a finding of probable cause that Vastola was involved in extortionate activity. Mahoney Affidavit at ¶ 38. The allowable inferences from the intercepted conversations in paragraph 38 are further supported by the conclusions of the affiant and by the information provided to the affiant by an informant. The affiant is an experienced FBI Agent in the investigation of organized crime activities, ¶¶ 1, 2; and thus is entitled to some deference when performing expert analysis.

> Not only must the experience of an expert affiant in examining evidence which might appear non-incriminating to a lay person be given certain deference, but: " . . . courts have long recognized that in the context of eavesdropping, and otherwise ambiguous conversation may serve as a predicate for probable cause so long as it is reasonably interpreted."

*U.S. v. Massino*, 605 F.Supp. 1565, 1573 (S.D.N.Y. 1985), *reversed on other grounds*, 784 F.2d 153 (2d Cir. 1986) (citations omitted). The affiant states that John LaMonte told him that Vastola had threatened him pursuant to the payment of monies, and that Vastola was the beneficiary of the extortion of LaMonte. ¶¶ 40, 41; *see Gates*, 462 U.S. at 237-38, 103 S.Ct. at 2331-32 (tips from informants,

particularly when supplemented by independent police investigations, amount to significant information for the magistrate's probable cause determination).

Probable cause to believe that Vastola was involved in extortion does not necessarily amount to probable cause to search the home for fruits of the extortion.

> [T]he fact that there is probable cause to believe that a person has committed a crime does not automatically give the police probable cause to search his house for evidence of that crime. "If that were so, there would be no reason to distinguish search warrants from arrest warrants, and cases like *Chimel v. California*, . . . would make little sense." We have consistently held that facts must exist in the affidavit which establish a nexus between the house to be searched and the evidence sought. . . .However, that nexus may be established either through direct observation or through normal inferences as to where the articles sought would be located.

*United States v. Freeman*, 685 F.2d 942, 949 (5th Cir. 1982) (citations omitted), *see also* W.R. LaFave, Search and Seizure, § 3.1(b) at 547 & n. 34 (2d ed. 1987) ("The other side of the coin is that there may be probable cause to arrest a person for an offense involving the use of certain instrumentalities without there being probable cause to search that person's residence for them."); *id.* at 545 & n. 26 ("In the case of search warrants, the conclusions go to the connection of the items sought with crime and to their present location.") (citation omitted).

A review of the Mahoney Affidavit does not indicate a basis for a probable cause belief that fruits of the

extortion could be found in the Vastola home. The government in its brief specifically identifies those paragraphs in the Affidavit which allegedly support such a finding. Paragraph 38 contains excerpts from a wiretap implicating Vastola in the LaMonte extortion. Paragraph 40 and 41 state that LaMonte informed Agent Mahoney that Vastola was extorting him. Paragraph 81 contains a wiretap excerpt which could support an inference that Vastola possessed a television set in his home, stolen pursuant to a mail and wire fraud scheme. Paragraph 90 describes Vastola's home with particularity. Paragraphs 6, 8, and 91 state Agent Mahoney's conclusion that Vastola is at the center of a criminal organization. Paragraphs 28, 39, and 92 state Mahoney's conclusions that Vastola is involved in extortion. Paragraphs 68 and 82 state Mahoney's conclusions that Vastola is involved in a mail and wire fraud scheme, and paragraphs 68 and 81 indicate televisions are a part of this scheme. Paragraph 93 states Agent Mahoney's conclusions that "Vastola has in his residence items obtained by mail and wire fraud." Paragraph 94 states the following:

> For these reasons, there is probable cause to believe that a search of the residence of Gaetano Vastola could result in evidence being discovered, such a cash received from extortion, records of loansharking and extortion and goods obtained by mail and wire fraud, and handwritten notes conversations relating to the above.

Agent Mahoney's conclusion that evidence of the mail and wire fraud scheme (a stolen television) is supported by intercepted conversations. *See* Mahoney Affidavit at ¶¶ 69, 81. However, there is no support in the Affidavit for Agent Mahoney's conclusion that the home contains

fruits of the extortion. The Vastola home is mentioned in three paragraphs of the Affidavit. Paragraphs 81 and 93 pertain to fruits of the mail and wire fraud. Only paragraph 94 discusses the home in relation to fruits of the extortion, and it does so in a conclusory manner. *Cf. United States v. Washington*, 797 F.2d 1461, 1472-73 (9th Cir. 1986) (The fact that government failed to make any showing to the magistrate that the suspect ran an illegal business out of his home was one of three reasons cited by the court in suppressing evidence seized from the home on the basis of an overbroad warrant.).

*Gates* teaches that conclusory statements alone cannot give rise to a probable cause finding. 462 U.S. at 239, 103 S.Ct. at 2333 ("Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."). While deference may be paid to an expert affiant, *United States v. Massino*, 605 F.Supp. at 1573, that deference cannot overcome a total lack of explanation of a conclusion. The evidence in the Mahoney Affidavit concerning the location of the fruits of the extortion is not ambiguous, it is totally absent.

The *Leon* standards indicate that suppression is an appropriate remedy where an officer relies on a "warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " *Leon*, 468 U.S. at 923, 104 S.Ct. at 3421 (citations omitted). The court finds that the conclusory statement by Agent Mahoney linking the fruits of extortion to Vastola's home, without any evidentiary support in the Affidavit, cannot serve as a basis for a reasonable belief that probable cause has been demonstrated. *Cf.*

*Washington*, 797 F.2d at 1472-73; *United States v. Nader*, 621 F.Supp. 1076, 1084 (D.D.C. 1985) (post-*Leon* case applying exclusionary rule based on failure to particularize).

Under *United States v. Christine*, 687 F.2d 749, 760-61 (3d Cir.1982), this court must determine which clauses in the warrant are supported by probable cause and which are not. This court concludes that the clause authorizing a search for "fruits and instrumentalities of the crimes of extortion . . . " is invalid and the clause authorizing the search for "a television set . . . " is valid. Therefore, items seized pursuant to the search for the fruits of extortion must be suppressed. *Christine*, 687 F.2d at 754 ("Materials seized under the authority of those parts of the warrant struck for invalidity must be suppressed, but the court need not suppress materials seized pursuant to valid portions of the warrant."); *see also United States v. GomezSoto*, 723 F.2d 649, 654 (9th Cir.), *cert. denied*, 466 U.S. 977, 104 S.Ct. 2360, 80 L.Ed.2d 831 (1984).

The parties have not provided relevant facts nor briefed legal arguments pertaining to the plain view and inevitable discovery doctrines. *See generally Washington*, 797 F.2d at 1468-69. To the extent they are applicable, the government is instructed to brief the issue within 10 days of this order; the defense is to respond within 20 days of this order.

**2. Saka Motion**

Saka challenges the search warrants and the underlying affidavit for his business (Video Warehouse), home, and car, on the theory that there was no particularization of the copyright fruits and instrumentalities to be seized.

The challenge applies only to copyright items and not fruits of other criminal activities named in the warrants. The copyright fruits were described in slightly different terms in each warrant. The critical language in each warrant is a variation on "illegally reproduced copyrighted tapes and records. . . ." The government argues that the warrants read in conjunction with the affidavit are sufficiently particularized. Although the challenge demands a difficult probable cause determination based on the facts of this case, the court finds the motion must be denied.

The particularization requirement is fundamental to fourth amendment law. *Washington*, 797 F.2d at 1471-72; *Savoca*, 761 F.2d at 296. "General warrants by failing to describe particularly the things to be seized, create a danger of unlimited discretion in the executing officer's determination of what is subject to seizure and a danger that items will be seized when the warrant refers to other items". *Savoca*, 761 F.2d at 299 (citation omitted). The particularity concept must be applied in the case at bar to the specific task of distinguishing illegal copyrighted tapes from legal (public domain) tapes. *Cf. Washington*, 797 F.2d at 1472, ("Thus, if items that are illegal or fraudulent are sought, the warrant must contain some guidelines to aid the officers in deciding what may or may not be seized.") (citation omitted).

A number of courts have applied the particularization requirements in context of a search for copyrighted records and tapes. This court finds the first circuit's approach articulated in *United States v. Klein*, 565 F.2d 183, 186-87 (1st Cir. 1977), to be most instructive. *Klein* concerned the search and seizure of unauthorized reproductions of copyright tapes ("pirate" tapes), as does the case

at bar. The *Klein* warrant authorized the executing officer to seize "certain 8-track electronic tapes and tape cartridges which are unauthorized pirate reproductions. . . ." 565 F.2d at 184. The fundamental flaw identified in the warrant and affidavit was that "the warrant failed to provide any before the fact guidance to the executing officers to which tapes were pirate reproductions." *Id.* at 188. The *Klein* court also identified a failure on part of the government of establish that there was a large collection of contraband on the defendant's premises. *Id.* Of further significance to the court, was their observation that the relevant information required could have easily been obtained and provided to the magistrate. *Id.; see also United States v. Cook*, 657 F.2d 730, 734 (5th Cir. 1981) ("If a law enforcement officer has a list of the property on the premises, he can determine what is likely to be illegal or evidence of illegality, and the magistrate may easily direct seizure of that property only without unnecessarily interfering with other property of the possessor."). The *Klein* court affirmed the district court suppression of the tapes seized. *See also Montilla Records of Puerto Rico, Inc. v. Morales*, 575 F.2d 324, 327 (1st Cir. 1978); *Cook*, 675 F.2d at 734. *But see E-C Tapes, Inc. v. Kelly*, 412 F.Supp. 245, 249 (N.D.Ill.1975).

The case at bar presents an extremely close question. The government clearly had evidence amounting to probable cause that Saka was involved in copyright violations while operating out of Video Warehouse, Affidavit at ¶¶ 54, 56, 57, 59, 64, and that fruits of that activity could be found a Video Warehouse, his residence, ¶ 66, and in his

car, ¶65. However, the warrant and the affidavit are lacking in the statement of a mechanism by which the executing officer can distinguish illegal tapes from legal tapes.

The government attempts to distinguish *Klein* on the facts, because in *Klein* reliance on experts at the scene of the search and seizure had not been demonstrated. *See Klein*, 565 F.2d F.2d at 186-87 & n. 5 ("Furthermore, there is no indication on the face of the warrant that the people executing the warrant would be experts in the field."). The government's distinction proves too much. The government argues in its brief that, "[i]n this case [the case of Saka], such an expert was referred to in the affidavit and was available at the scene to assist the seizing agents." MOL of United States in Opposition 135. However, even if the mere presence of an expert was presumed to be an adequate showing of a mechanism to differentiate legal from illegal tapes, the Affidavit does not in fact support the assertion that such an expert was to be on the scene. No representation to the effect was made to the magistrate who issued the warrant. The reference in the Affidavit to the expert is silent as to his intended role in the search, or his ability to differentiate legal from illegal tapes. *See* ¶ 65. The court does not disagree with the government's after the fact explanation that a list detailing every tape to be seized was unnecessary, nor that a screening of the tapes at the scene was impractical due to the volume seized. However, these explanations do not substitute for a showing of particularization that must be made to the magistrate. *See Klein*, 565 F.2d at 186 & n. 4 ("It is of course, rudimentary that the validity of the warrant must be appraised by the facts revealed to the

magistrate and not those later found to exist by executing officers.") (citation omitted).

Review by the district court is not *de novo*, *Gates*, 462 U.S. at 235, 103 S.Ct. at 2330; if it were, this court has little doubt that it would find the government failed to meet its particularization requirement. In the role of a reviewing court, this court finds that the affidavit does provide sufficient information to support a probable cause inference that the illegal copyright items constituted a "dominant" element of the tape inventory. *See United States v. Cortellesso*, 601 F.2d 28, 32 (1st Cir. 1979), *cert. denied*, 444 U.S. 1072, 100 S.Ct. 1016, 62 L.Ed.2d 753 (1980) (applying the *Klein* standards to a search for stolen goods, clothing items identified as "men's suits, sports jackets, women's boots, leather coats, fur coats . . . ," holding that particularization requirements change in a context where there is evidence of "a large collection of stolen goods [obtained] through a facade of legitimacy.") (citation omitted). The *Cortellesso* court ruled that a generic class of items to be seized was acceptable, because the magistrate was not required to speculate as to whether the executing officers could make the necessary distinctions. *Id.* at 32 ("There was a great likelihood that the goods to be seized would be indeed stolen.") (citation omitted).

In the case at bar, the magistrate was presented with sufficient evidence to support an inference that Video Warehouse was, in fact, an operation engaging in a range of criminal activities with a front of legitimacy. The warrant and Affidavit address at least five types of criminal activity. The specific evidence on copyright violations demonstrate a large scale video duplicating enterprise,

¶¶ 53, 54 ("300-400 machines, VCR's and discussed running 100 slaves from one master"). There was adequate evidence to suggest (1) that the enterprise was involved in illegal duplication, ¶¶ 54, 56, 57, 59, 64; (2) that four illegally copyrighted tapes were identified by name, ¶¶ 57, 59; and (3) that 13 other tapes were illegally duplicated (supported by undercover surveillance and expert investigation), ¶¶ 64, 65. Taking all these elements in combination, the Affidavit provided a reasonable basis for the seizure of all videotape instrumentalities on the premises. This court is instructed to review the warrant "in a common sense and realistic fashion." *United States v. Ventresca*, 380 U.S. 102, 108-09, 85 S.Ct. 741, 745-46, 13 L.Ed.2d 684 (1965). Although the specific factual predicate for the copyright section of the warrant is poorly developed, and there is no doubt that the government could have reasonably provided the magistrate with more specific information, this court finds on balance that there was no violation. Defendant's motion to suppress is denied.

### 3. Majuri Motion

Majuri seeks suppression of two firearms seized from his home, based on contentions that the warrant was not supported by probable cause, that the information supporting the warrant was stale, and that the search exceeded the scope of the warrant. For the reasons stated below, defendant's motion is denied. The Mahoney Affidavit contains intercepted phone conversations between Majuri and Massaro alluding to gambling activities. ¶¶ 14, 18, 21. The affiant, based on his experience, is entitled to interpret language and activities not generally familiar to

a lay person for consideration by the magistrate. *United States v. Massino*, 605 F.Supp. at 1573. The affiant concluded that the intercepted conversations between Majuri and Massaro concerned a gambling operation. ¶ 22. The Affidavit also established a link between Majuri's gambling activities and his home. Each gambling conversation noted above was made to Majuri at a phone listed to Joan Majuri at the street address which was searched. The affidavit also describes additional intercepted conversations between Massaro and others indicating that Massaro was involved in illegal gambling. ¶¶ 10, 12, 16, 24, 25. Finally, Agent Mahoney stated that a confidential informant, which a track record or reliability, had provided gambling information on Majuri as late as September 23, 1985. This information supports a finding that evidence of illegal gambling activities could be found at Majuri's home.

Majuri also challenges the warrant on the basis of staleness. The Affidavit was filed with the magistrate on October 7, 1985, and the warrant issued October 16, 1985. The information obtained by electronic surveillance was intercepted over a two-month period from December, 1984, to January, 1985. ¶¶ 14, 18, 21, 26. Although this information tends to support a continuing pattern of criminal activity, it alone would not support a warrant issued some ten months later. *See United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972). However, the affiant stated that he received confidential information as late as September 23, 1985, that Majuri was involved in illegal gambling. It is not clear from the Affidavit to what time period the confidential information pertained. However, this tip amounts to a showing upon which the magistrate

was entitled to base a probable cause finding because it was rendered by a reliable informant and supported by information obtained in the wiretap during the December, 1984-January, 1985 period.

Finally, Majuri challenges the scope of the search. He alleges that the guns were seized in the basement, an area of the house controlled by Carmella Majuri, not the defendant Charles Majuri. The warrant did not specify sections within the house, and could reasonably be read to cover the whole house. The officer who was involved in the search has stated that he was aware that Majuri was a convicted felon. Affidavit of William Eichhorn, July 16, 1987. This information need not have been presented to the magistrate, since the guns were seized when spotted in plain view while executing a valid search for gambling instrumentalities. *See generally Illinois v. Andreas*, 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003 (1983). Because the searching officer was aware that Majuri was a convicted felon, possession of firearms in evidence of criminal activity. Furthermore, Majuri's argument that the basement was outside an area of his control is without merit. Even if accepted as true, the argument fails because Majuri would be without standing to bring it. *See generally Rawlings v. Kentucky*, 448 U.S. 98, 106, 100 S.Ct. 2556, 2562, 65 L.Ed.2d 633 (1980) (defendant had no legitimate expectation of privacy as to the property that was searched). In conclusion, Majuri's motion to suppress is denied.

4. **Brocco Motion**

Brocco seeks suppression of the fruits of the search of his home on a "taint" theory based on assertions of an

illegal electronic surveillance of the residence. This court finds Brocco's arguments to suppress the electronic surveillance to be without merit. *See* Part V-B-1 of this opinion. Therefore, the motion suppress fruits of the search is denied.

### B. Defendants' Joint Motion to Suppress Electronic Surveillance

The defendants' joint electronic surveillance suppression motion challenges all of an extraordinary volume of electronic surveillance interceptions. For the reasons stated below, this court finds that the defendants' motion to suppress is granted in part and denied in part.

This court finds that three theories of suppression are applicable in this case. Where the government's showing of probable cause rests on the bare conclusions of affiants, suppression is appropriate. *Gates*, 462 U.S. at 239, 103 S.Ct. at 2332. Where the government obtains surveillance extensions which are derived form prior orders found to be illegally authorized, suppression of the fruits of the extension is also required. *United States v. Giordano*, 416 U.S. 505, 533, 94 S.Ct. 1820, 1835, 40 L.Ed.2d 341 (1974). Where the government obtains a surveillance order based on information that is not independent of "taint," the fruits of such surveillance must be suppressed. *United States v. Plotkin*, 550 F.2d 693, 696 (1st Cir.), *cert. denied*, 434 U.S. 820, 98 S.Ct. 61, 54 L.Ed.2d 76 (1977).

#### 1. The Government's Electronic Surveillance Did Not Constitute A General Search

The federal electronic surveillance statute, 18 U.S.C. § 2518 *et seq.*, balances the fourth amendment privacy

rights of individuals against the interest of the government in law and order, granting law enforcement officers broad but circumscribed powers. To obtain a court order approving electronic surveillance, law enforcement officers must show probable cause to believe that conversations concerning certain offenses will be intercepted at certain locations, and show that electronic surveillance is needed to investigate these offenses. 18 U.S.C. § 2518(3). Interceptions must be limited to those ordered by the court. 18 U.S.C. § 2518(5). A surveillance order must be correctly authorized, and it must be correctly executed. The government must adequately justify the extent of intrusion that it requests, and then it must limit itself to that scope once a court approves its request.

In this case defendants claim that electronic surveillance orders have been ordered with regard to so many persons and offenses that the government has, in effect, executed an unconstitutional general search, an "unauthorized invasion" of defendants' privacy. *Berger v. New York*, 388 U.S. 41, 58, 87 S.Ct. 1873, 1883, 18 L.Ed.2d 1040 (1967) (overturning a New York wiretap statute for permitting "indiscriminate use" of electronic surveillance). The defendants neither show that this volume of electronic surveillance violated the provisions of the statute, nor do defendants challenge the constitutionality of the statute's protection for privacy interests. *See generally Berger*, 388 U.S. 41, 87 S.Ct. 1873. Therefore, the defendants fail to marshall appropriate arguments to support their claim that an unconstitutional "general search" was executed.

Similarly, the defendants argue that many of the individual surveillance applications lacked a substantial

showing of probable cause (which the defendants gauge as "percent" probable cause.). The defendants believe that a probable cause linking should be shown between a certain percentage of individuals named in a surveillance application and a certain percentage of offenses named in the application before a valid surveillance order should issue. However, the defendants fail to demonstrate any support for this position in the statute, in the case law, or in public policy. The statute on its face requires that the identities of persons whose communications are to be intercepted must be listed *if* those persons are known. 18 U.S.C. § 2518(1)(b)(iv) & (4)(a) (emphasis added). Anyone, even unidentified persons, may be monitored so long as known persons are listed. *United States v. Kahn*, 415 U.S. 143, 157, 94 S.Ct. 977, 985, 39 L.Ed.2d 225 (1974); *United States v. Tehfe*, 722 F.2d 1114, 1117 (3d Cir.1983), *cert. denied*, 466 U.S. 904, 104 S.Ct. 1679, 80 L.Ed.2d 154 (1984). Naming persons who are expected to be intercepted, but who are not suspected of illegal activity, comports with the public policy behind the notice provision of the electronic surveillance statute, § 2518(8)(d). *United States v. Martin*, 599 F.2d 880, 885 (9th Cir.), *cert. denied*, 441 U.S. 962, 99 S.Ct. 2408, 60 L.Ed.2d 1067 (1979). Conversations involving persons known or unknown may be monitored only for so long as is necessary to intercept conversations concerning the particular criminal activities during the period authorized for interception by the court. § 2518(5). Section 2518(3)(c) merely requires a showing of probable cause that some individual is connected to an offense in order to authorize the interception of unknown persons' communications involving that offense that originates from a particular facility. *Kahn*, 415

U.S. at 155 n. 15, 94 S.Ct. at 984 n. 15; *see also Zurcher v. Stanford Daily*, 436 U.S. 547, 558, 98 S.Ct. 1970, 1977, 56 L.Ed.2d 525 (1978) (citing *Kahn* to uphold a search warrant for a particular facility that did not name particular persons). The court again finds that the defendants' argument that these surveillances constitute a general search is without merit.

### 2. Probable Cause and the New Jersey Surveillances

#### a. The November 28, 1984 Surveillance at the Massaro Residence

The standard of review for findings of probable cause sufficient to justify the issuance of a search warrant is the "totality of the circumstances" doctrine set forth in *Gates*. *Gates*, 462 U.S. at 238, 103 S.Ct. at 2332. *Gates* softened the strict informant reliability tests previously required under the Court's opinion in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). *Gates* requires merely enough corroboration of an informant's testimony through other sources in order to demonstrate some basis for the informant's reliability. *Gates*, 462 U.S. at 244, 103 S.Ct. at 2335. In the initial Massaro surveillance application, confidential informant B's information about Massaro's bookmaking activities is corroborated by confidential informant A's information, by visual surveillance, and by telephone usage patterns, all of which tend to establish B's general reliability as an informant. His description of "scam" gambling games to be held by the wiretap targets, including the involvement of loansharks, contains sufficient detail to allow the magistrate to rely

on this tip. *Spinelli*, 393 U.S. at 416, 89 S.Ct. at 589. Thus, Judge Breitkoph's order authorizing electronic surveillance of communications involving gambling, usury, and theft by deception (scam gambling games), over Massaro's telephone lines was supported by adequate findings of probable cause.

**b. The December 5, 1984 Amendment, and the December 14 and 24 Extensions of the Massaro Surveillance**

The affiant for the Massaro surveillance applications, Investigator Codelensky, presented a tip from informant B indicating that certain individuals were engaging in theft, i.e., the illegal duplication of videotapes ("video bootlegging"). The tip was corroborated by incidentally intercepted conversations from the Massaro surveillance (i.e. discussions concerning the duplication of wholesale quantities of videotapes for low prices to be shipped in passenger-car trunks). This information meets probable cause requirements to authorize surveillance for theft. *Gates*, 462 U.S. at 244-45, 103 S.Ct. at 2335-36.

Subsequent Massaro surveillance extensions were properly ordered. Extension applications presented information in addition to that which was sufficient in the initial order and amendment to establish probable cause for gambling, usury, theft by deception, and theft ("video bootlegging"). *United States v. Vasquez*, 605 F.2d 1269, 1273 (2d Cir.), *cert. denied*, 444 U.S. 981, 100 S.Ct. 484, 62 L.Ed.2d 408 (1979).

### c. The Union County Prosecutor's Video Warehouse Electronic Surveillance Order, Amendment, and Extensions

Despite the defendants' assertions that the videotape duplication business operating as the Video Warehouse was entirely legal, and could be viewed as legitimate based upon the facts presented by the electronic surveillance applications, this court accepts Judge Breitkopt's determination that probable cause supported his December 12, 1984 order authorizing electronic surveillance to investigate theft ("video bootlegging") at Video Warehouse. As previously discussed for the Massaro residence surveillance, informant B's tip corroborated by other evidence suggestive of that illegal activity is sufficient to support a finding of probable cause, even if "innocent" explanations for surveillance targets' activities can be imagined. *Gates*, 462 U.S. at 243 & n. 13, 103 S.Ct. at 2335 & n. 13.

The December 20, 1984 amendment, and December 31, 1984 and January 11, 1985 extensions are similarly supported by findings of probable cause. A magistrate considering the informant's tips (as discussed in part 2(a) above), and relevant interceptions over the Massaro wiretap, could conclude that there was probable cause that conversations concerning gambling and theft would be intercepted through electronic surveillance at the Video Warehouse during this period. *Id.* at 230, 103 S.Ct. at 2328.

### d. The New Surveillance at Video Warehouse, Amendment and Extensions

Defendants suggest that the January 24, 1985 application for a new Video Warehouse surveillance order was

misleading because it included conclusions not supported by the facts presented. It is the issuing court's conclusions, however, not the applicant's conclusions, however, not the applicant's conclusions, that are subject to review. The issuing judge need not endorse all of the applicant's conclusions in order to find sufficient probable cause to authorize a surveillance. *Armocida*, 515 F.2d at 41 (affiant's "conclusion" is not a "fact" which can be tested for misrepresentation). Based upon the totality of credible factual information offered in this application, this court finds that electronic surveillance to investigate bribery and corrupt influence, theft, and usury and properly authorized.

There was sufficient information in the January 24, 1985 application concerning financial connections and apparent undue influence between various individuals awarding and bidding for government construction contracts to arrive at a finding of probable cause to believe that bribery and corrupt influence were taking place. In particular, information in the application suggests that (1) James Kehoe was project manager for the government's Earl Naval Weapons Station construction project (Criminal Action Application Pursuant to N.J.S. 2A:156A-9 at ¶31 (January 24, 1985)) ("January 24 Application"); (2) Kehoe was providing "inside" information to assist certain other surveillance targets' attempts to obtain Earl Naval Weapons Station construction contracts, in exchange for a percentage of the proceeds (January 24 Application at ¶19); (3) Kehoe provided his only set of plans for at least one construction project for surveillance targets' use (January 24 Application at ¶31). From this information a magistrate could find probable cause to

properly authorize interception of conversation concerning bribery and corrupt influence.

Information suggesting loansharking activity in prior affidavits, combined with the February 6, 1985 conversations between Massaro and Kehoe (Criminal Action Application for Extension and Amended Orders Pursuant to N.J.S. 2A:156a-9/N.J.S. 2A:156A-12 (February 13, 1985)), which strongly suggests a usurious loan, establishes probable cause for interception of conversations concerning usury pursuant to the February 13 amendment and extension of the New Video Warehouse order.

The sufficiency of a showing of probable cause under New Jersey law for a new "order to intercept a communication of a person or on a facility which was the subject of a previous order" ("repeat order"), N.J.Stat.Ann. § 2A:156-10(f), as distinguished from "a renewal or extension" of a previous order, *id.*, appears to be a matter of first impression of this court. A showing of probable cause sufficient for a repeat order must be "based upon new evidence or information different from and in addition to the evidence or information offered to support to prior order." *Id.* In the instant application, the only "new" probable cause information which had not been incorporated in the applications for the prior Video Warehouse order and its extensions is explicitly concerned with the bribery and corrupt influence offenses. Additional information concerning gambling, conspiracy, and usury, is incorporated by reference to the Majuri and Killeen electronic surveillance applications.

The defense argues that the January 24 application has not met the statutory requirement that probable cause

information in addition to that used to support the original order must be presented in order to repeat surveillance after two extensions have been granted. However, on its face, the § 2A:156-10(f) requirement to present probable cause information different from that "offered to support the prior order" can be satisfied with information incorporated by reference to applications for extensions to the prior order. The applications for the December 20, 1984 amendment, and December 31, 1984, and January 11, 1985 extensions to the original Video Warehouse order, incorporated by reference in the January 25, 1985 renewal application, do contain "information different from and in addition to" that found in the application for the original order. This information includes interceptions pursuant to the order itself. The statute clearly differentiates between an application for an order and an application for renewal or extension of an order. N.J.Stat.Ann §§ 2A:156A-9(d), 2A:156A-10(f); *Vasquez*, 605 F.2d at 1277 (New Jersey "set[s] the standards for issuance of a 20-day order higher than those governing issuance of a 10-day extension.") (footnote omitted). This court holds, therefore, that additional probable cause could be found, for the new order to authorize interception of conversations concerning the offense of theft, based upon "new" information incorporated by reference to the prior extension applications. Such information satisfies the requirement than a greater showing of probable cause than that originally offered be presented in order to obtain a new order. *Id.*

Pursuant to N.J.Stat.Ann. § 2A:156A-12(f), law enforcement officers properly instructed their monitors to sharply reduce eavesdropping of theft conversations to

those minimally necessary to fulfill their newly stated objective of merely tracking developments regarding video duplication activities. *New Jersey v. Catania*, 85 N.J. 418, 434, 427 A.2d 537, 545 (1981) ("police must make reasonable efforts to minimize intrinsically [through monitoring] as well as extrinsically"); *cf. United States v. Harvey*, 560 F.Supp. 1040, 1058 (S.D.Fla.1982), *aff'd*, 789 F.2d 1492 (11th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 190, 93 L.Ed.2d 123 (1986) (continuing electronic surveillance is permitted for the purpose of determining "the scope of the conspiracy and the identity of the individuals involved") (*citing United States v. McCoy*, 539 F.2d 1050, 1056 (5th Cir.1976), *cert. denied*, 431 U.S. 919, 97 S.Ct. 2185, 53 L.Ed.2d 230 (1977)).

Extensions with regard to theft, bribery and corrupt influence, and usury, were also properly granted pursuant to 18 U.S.C. § 2518(1)(f) and N.J.Stat.Ann. 2A:156A-9(d) upon reporting the results of the ongoing surveillance in the extension applications.

**e. The Brocco Residence Surveillance**

Information from applications for the Massaro and Video Warehouse applications, incorporated by reference into the Brocco application, establish ample probable cause to believe that conversations concerning theft and bribery and corrupt influence would be intercepted over Brocco's telephone lines for the reasons stated in detail in part 2(e) above. Additional information presented in the Brocco application reinforces this finding. It is noted that

a magistrate could find probable cause to intercept conversations regarding video bootlegging despite the likelihood that legitimate tape duplicating was also taking place.

Extensions of the Brocco surveillance were supported by the findings of probable cause in the initial order, supplemented by the results thus far obtained from the surveillance, which were properly reported in the extension applications pursuant to 18 U.S.C. § 2518(1)(f) and N.J.Stat.Ann. 2A:156A-9(d). Thus, the extensions were properly granted.

**f. The Killeen and Majuri Residences Surveillance**

Visual and electronic surveillance evidence reported to support these applications is somewhat ambiguous. However, considering the totality of circumstances, including the incorporation by reference of the Massaro and Video Warehouse applications that this court has reviewed and approved (part 2(e) above), a substantial basis was established for a finding of probable cause to intercept conversations concerning the offenses of conspiracy and promoting gambling at both locations, and usury at the Killeen residence.

**g. The March 14, 1985 Federal Video Warehouse Surveillance**

The affidavit for the March 14, 1985 order authorizing electronic surveillance at Video Warehouse demonstrates a plausible organization connecting a number of

the surveillance targets to a number of offense. The issuing magistrate could find that probable cause supports the government's belief that a racketeering organization was operating from the Video Warehouse.

Probable cause for narcotics interceptions was established by an informant's tip corroborated by evidence of surveillance targets' activities which might otherwise seem "innocent" of wrongdoing. *Gates*, 462 U.S. at 243 & n. 13, 103 S.Ct. at 2335 & n. 13. Probable cause for mail and wire fraud (construction bid rigging) was established in the same manner as has been discussed for the Union County Video Warehouse surveillance (bribery and corrupt influences), discussed herein at part 2(e). Probable cause for all of the elements of 18 U.S.C. § 892, extortionate extensions of credit, including legally unenforceable credit transactions, usurious interest rates, reputation for the use of extortionate means (criminal convictions), and credit exceeding $100, was shown through an informant's tip, corroborated by previous interceptions and other information.

The government has demonstrated that named targets of this surveillance had conducted gambling activities continuously between September, 1984 and January 3, 1985. This court notes that this gambling activity was of a sufficiently "protracted and continuous nature" such that there was probable cause for the interception of gambling conversations as of March 14, 1985. *Tehfe*, 722 F.2d at 1119.

**h. The April 16, Video Warehouse Order**

The April 16 Video Warehouse extension properly ordered surveillance for extortion, gambling, narcotics,

and wire fraud/mail fraud (construction contracts). The March 14 Video Warehouse application, incorporated by reference into the April 16 application, established probable cause for these offenses. The April 16 application reports the results thus far obtained by the ongoing surveillance, without significant bias, pursuant to 18 U.S.C. § 2518(1)(f). The court reserves opinion on the suppression of interceptions pertaining to theft from interstate shipment and wire fraud/mail fraud with regard to illegal tape duplication ("videoduplicating"), pending further argument scheduled for September 8, 1987.

### i. The May 14 Video Warehouse Order

Ample probable cause for interception of conversations concerning narcotics, gambling, extortion, and wire fraud/mail fraud (construction), has been established by incorporation of prior applications and presentation of subsequent interceptions. Ample probable cause also existed for the interceptions of conversations concerning Western Union Access codes. The April 16 Affidavit (Extension) provides indicia of wrongdoing adequate to support a probable cause finding as to Western Union fraud. Agent Dossett described specific telephone conversations from Video Warehouse where Massaro, Sr. and Massaro, Jr. discussed Stone's attempt to combine access numbers to find a new code. ¶ 57. Paragraph 56 provides evidence of codes being used that do not work. The May 14, 1985 Affidavit (Second Extension) includes further evidence of a pattern of trying out different access numbers. Such evidence provides the substantial basis to the judicial

officer for uncovering evidence of wrongdoing that is required by *Gates*, 462 U.S. at 236, 103 S.Ct. at 2331.

The court reserves opinion on suppression of surveillances of theft from interstate shipment, and mail/wire fraud (video bootlegging and "bust-out") pending further argument.

### j. The June 26 Video Warehouse Order

The government's investigation of narcotics, gambling, extortion, wire fraud/mail (construction contracts) and Western Union fraud at the relocated Video Warehouse operation is essentially identical to that a the previous location. These may be considered ongoing activities involving the same participants. Probable cause to intercept conversations concerning these activities has been amply established by the preceding federal Video Warehouse applications (incorporated by reference) and supplemented by later interceptions. The court reserves opinion on the suppression of interceptions pertaining to wire/mail fraud (video duplicating and "bust-out") and theft from interstate shipment, pending further argument.

### k. The July 25 Video Warehouse Order

The court reserves opinion on the suppression of interceptions pertaining to theft from interstate shipment, and mail/wire fraud (video bootlegging and "bust-out") pending further argument. Defendants' motion to suppress is denied with respect to all other interceptions.

### 3. Defendants' Request For A Franks Hearing

The defendants have not demonstrated inaccuracies, omissions, or misrepresentations, in the electronic surveillance applications which could be regarded as necessary to the issuance of any of the surveillance orders. Thus, defendants are not entitled to a *Franks* hearing to test the validity of any of the surveillance orders. *Franks*, 438 U.S. at 171-72, 98 S.Ct. at 2684-85.

### 4. Failure to Exhaust Ordinary Investigative Means

Defendants claim that, in several instances, the government failed to meet its obligation to demonstrate that it had exhausted ordinary means of investigation before requesting electronic surveillance. 18 U.S.C. § 2518(3)(c). This claim is without merit. The government is not required to attempt every possible alternative means short of electronic surveillance, but merely to show what has been tried and to state its estimation of the probable success of other methods. *See Armocida*, 515 F.2d at 38 ("To support a finding that normal investigative procedures are unlikely to be successful, [2518(3)(c) only requires] a factual predicate in the affidavit.") In particular, the defendants argue that the government should have questioned those persons engaging in transactions with surveillance targets in order to determine if these activities are legal. Such a course would not only be unlikely to provide significant information about the details behind these activities, but would also be likely to expose the ongoing investigation. Here, the defendants'

argument is not pertinent to a proper showing of alternative investigatory means so much as it is a criticism of the government's showing of probable cause to believe that the defendants' activities were illegal.

The surveillance targets were engaged in elaborate transactions which did not appear within plain view. A "sting" operation would not have been as likely to provide information about the identities of all of the persons involved in various activities and the scope of their involvement. A magistrate could have found that electronic surveillance was needed to investigate the extent of these activities. Additional information about the extent to which LaMonte was providing or willing to provide personal information regarding the surveillance targets and their activities would not have affected this finding. The government's electronic surveillance applications put forward sufficient detail about the pursuit of alternative investigative means to convince a magistrate that electronic surveillance was needed to pursue legitimate investigatory goals. *Gates*, 462 U.S. at 236, 103 S.Ct. at 2331.

### 5. Delay in Sealing the Fruits of the March 25, 1985 Video Warehouse Order

The government admits that the tape recordings of interceptions pursuant to the March 25, 1985, Video Warehouse surveillance were not sealed until July 15, 1985, but claims that this violation of the statutory requirement that tapes be sealed immediately following "the conclusion of one continuous period of surveillance," *Persico*, 621 F.Supp. at 865, does not mandate suppression.

"[F]ailure to seal the tapes promptly is not such a violation that requires suppression as a matter of law. . . . The crucial factor, however, is the integrity of the tapes themselves." *United States v. Falcone*, 505 F.2d 478, 484 (3d Cir.1974). In *Falcone*, the trial court held an evidentiary hearing to determine the integrity of the tapes. Where the integrity of the tapes is not in dispute, "a delay in sealing the tapes is not, in and of itself, sufficient reason to suppress the evidence obtained therefrom." *Id.* In the case at bar, the integrity of the tapes has not been questioned, and thus suppression is not mandated. Similarly, the delay in sealing two reels of tape until August 19, 1986, caused by clerical error, does not require suppression.

### 6. The Maryland Surveillance Orders

#### a. The March 19 Surveillance Order

The March 19 Maryland surveillance order properly authorized the interception of conversations regarding wire fraud and extortion. Contrary to the defendants' attempt to demonstrate governmental misrepresentations in the electronic surveillance applications concerning surveillance targets' narcotics activities, the presentation or omission of probable cause information regarding narcotics, which is named as an offense in the succeeding surveillance order but not in the March 19 order, is irrelevant to the appropriateness of surveillance regarding wire fraud and extortion. This is not a subterfuge search, *United States v. McKinnon*, 721 F.2d 19, 23 & n. 2 (1st Cir.1983), but a surveillance order based upon a substantial basis for probable cause to believe that conversations

concerning wire fraud and extortion would be intercepted over the designated telephone lines. The applications' discussion of suspected narcotics activities is therefore irrelevant to the validity of this order.

The precision and attention to detail displayed in the government's showing of exhaustion of ordinary investigatory means, without significant misrepresentation with regard to the offense to be surveilled, tends to support the applicant's claim that electronic surveillance was needed to further the government's investigation.

b. **The April 23, 1985 Extension of the Maryland Surveillance**

When conversations are electronically monitored which clearly relate to illegal activities, law enforcement officers may intercept these conversations and subsequently apply for judicial authorization to intercept them, pursuant to 18 U.S.C. § 2517(5). Incidental interception of original surveillance order was permissible because the original March 19 surveillance was not a "subterfuge search." *McKinon*, 721 F.2d at 23 & n.2; *accord, United States v. Gambale*, 610 F.Supp. 1515, 1528 (D.Mass.1985). Law enforcement officers' clear indication in the original application that they expected to intercept narcotics conversations pursuant to that order, although they lacked probable cause to intercept, suggests candor rather than subterfuge. Authorization to intercept narcotics conversations was properly sought after these conversations began to be intercepted. *United States v. Masciarelli*, 558 F.2d 1064, 1067-68 (3d Cir.1977); *accord United States v. Gerena*,

653 F.Supp. 974, 982 (D.Conn.1987). A substantial showing of the need for electronic surveillance to investigate the scope of narcotics activities was also supplied. *United States v. Tufaro*, 593 F.Supp. 476, 491 (S.D.N.Y.1983), *aff'd*, 762 F.2d 991 (2d Cir.), *cert. denied*, 474 U.S. 826, 106 S.Ct. 84, 88 L.Ed.2d 69 (1985); *United States v. Baynes*, 400 F.Supp. 285, 299-300 (E.D.Pa.1975).

**7. New York Federal Surveillance**

Defendants argue that the omission of detail in the Roulette Records surveillance application concerning John LaMonte's willingness to cooperate with the government investigation, particularly his willingness to provide consensual recordings, mandates suppression of the fruits of that surveillance. This court holds that suppression is not required. The issuing magistrate's finding that alternative investigatory means were not available would not have been affected by the knowledge that LaMonte was willing to make consensual recordings. *See United States v. Ippolito*, 774 F.2d 1482, 1486-87 (9th Cir. 1985). Such recordings would be no more likely than LaMonte's own testimony to reveal the scope of the alleged extortionate operation's activities outside of Lamonte's personal knowledge. It was reasonable for the magistrate to conclude that conversations to be intercepted between alleged participants would yield evidence relevant to the extortion of LaMonte, information not otherwise made available by calling LaMonte as a cooperating witness or by simply recording LaMonte's conversations with alleged participants. In this respect, the defendants' motion to suppress is denied.

Defendants also argue that the omission of reference to prior Union County surveillance orders in the application for the Roulette Records surveillance mandates suppression pursuant to the requirement of 18 U.S.C. § 2518(1)(e) that "all previous applications know to the individual authorizing and making the application . . . involving any of the same persons, facilities, or places specified in the [subsequent] application" must be identified in the subsequent application. However, if the omission is unintentional, suppression is not required. *United States v. Van Horn*, 789 F.2d 1492, 1500 (11th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 190, 93 L.Ed.2d 123 (1986). Here, the defendants fail to show that this omission was intentional or reckless. Along with Special Agent Ferreira's supplemental affidavit, affirming his lack of knowledge concerning the Union County prosecutor's electronic surveillance at that time, M.O.L. Of The United States In Opposition To Joint Motion Of Defendants To Suppress The Fruits Of Electronic Surveillances, Exhibit 3, the fact that the New York federal application meticulously cites a number of other prior electronic surveillances, including the federal Video Warehouse surveillance, suggests that the omission was unintentional. According, suppression is not required.

Defendants further argue that the quantity of simultaneous wiretaps authorized in the New York federal investigation precludes the possibility of a valid showing of exhaustion of alternative investigatory methods pursuant to § 2518(3)(c) for at least some of these wiretaps. They argue that at least some of the wiretaps are redundant because of the likelihood that many conversations could be simultaneously intercepted over two wiretapped

telephones when surveillance targets spoke to one another. In arguing redundancy, however, the defendants neglect to give sufficient consideration to the likelihood that significant conversations might be intercepted over these wiretaps that did not originate from any of the other wiretapped telephones. For each wiretap, probable cause and the need for electronic surveillance were properly demonstrated. Suppression is not warranted.

### 8. Defendants' Request for Orders and Applications for Surveillances at the Olympia Esposito Residence, the Smith Street Democratic Club, and Manhattan Social Clubs

#### a. The Olympia Esposito Residence 10-Day Reports

The government has agreed to provide the defendants with 10-day reports from the original Esposito surveillance that were incorporated by reference into the application for extension of the Esposito order. Letter from Bruce Repetto, Assistant United States Attorney, to Judge Stanley S. Brotman (August 12, 1987). It appears that this request is now moot.

#### b. The Democratic Club Applications and Orders

Defendants are not entitled to orders and applications relating to electronic surveillance at the Smith Street Democratic club because no defendant has standing to challenge those orders. It is undisputed that no defendant was named in these orders or intercepted pursuant to these orders. M.O.L. In Opposition (Electronic Surveillance) at 151, Exhibit 3. Therefore, the orders and applications need not be disclosed pursuant to § 2518(9).

*Alderman v. United States*, 394 U.S. 165, 171-72, 89 S.Ct. 961, 965-66, 22 L.Ed.2d 176 (1969).

**c. The Manhattan Social Clubs Applications and Orders**

Defendants are not entitled to orders and applications relating to electronic surveillance at two Manhattan social clubs. According to the representation of the government, which has not been disputed, no interceptions were obtained pursuant to these orders. Thus, defendants have not demonstrated their standing as "aggrieved persons" able to suppress these surveillances because they were intercepted, and no representation has been made that they own the premises that were surveilled. *United States v. Lanese*, 385 F.Supp. 525, 527 (N.D.Oh.1974) (citing 18 U.S.C §§ 2510(11), 2518(10)(a)); *cf. United States v. Torres*, 583 F.Supp. 86, 96 (N.D.Ill.1984), *rev'd on other grounds*, 751 F.2d 875 (7th Cir.1984) ("Only defendants who are overheard in an earlier interception are 'aggrieved persons' entitled to assert that a later interception was tainted by an earlier one."). Defendants' request for these materials is denied.

In summary, the court reserves on the defendants' motion to suppress electronic surveillance interceptions as it pertains to theft from interstate shipment (orders dated April 16, 1985, May 14, 1985, June 26, 1985, July 25, 1985), mail fraud/wire fraud – video duplicating (orders dated April 16, 1985, May 14, 1985, June 26, 1985, July 25, 1985), and mail fraud/wire fraud – "bust-out" (orders dated May 14, 1985, June 26, 1985, July 25, 1985); the motion is denied as to all other interceptions.

An appropriate order will be entered.

ORDER

This matter having been brought before the court on motions of defendants; and

The court having reviewed the submissions and oral argument of the parties; and

For the reasons expressed in this court's opinion filed this date

IT IS on this 1st day of September, 1987, hereby

ORDERED:

1. All motions be defendants to dismiss counts of the indictment are DENIED.

2. All motions be defendants to require the government to elect between offenses charged in individual counts, or to elect between counts, are DENIED.

3. Defendants' joint motion to strike surplusage from the indictment is GRANTED IN PART and DENIED IN PART.

4. Defendants' joint motion and individual motions to sever are GRANTED IN PART and DENIED IN PART; the matter is severed into seven separate trials; see Part III-A of the attached opinion.

5. The dates for the five trials involving the eleven non-RICO defendants commerce on October 13, 1987; the dates for the two trials of the ten RICO defendants commence on March 7, 1988. Counsel are to appear on September 8, 1987 at 9:30 a.m., in order to discuss the order

of trials; following the hearing, the court will issue a supplemental order listing trial dates and a schedule for pre-trial motions.

6. All motions to adjourn the trial dates are DENIED.

7. The motion of defendants Levy and Fisher to compel discovery is DENIED; the government is ordered to review the New York wiretap information, as described in the attached opinion, and to file the two requested reports with the court within fifteen (15) days of the date of this order.

8. Defendants' joint motion and individual motions for a bill of particulars are GRANTED IN PART and DENIED IN PART; any required *in camera* submissions by the government to be made within twenty (20) days of the date of this Order.

9. All other defense motions for pretrial hearings and discovery (proffer of single conspiracy); *James* hearing; evidentiary material (prior conduct, prior convictions, bad acts); and pretrial discovery (witness list, statements of nontestifying witnesses, grand jury information) are DENIED.

10. Defendants Vastola's motion to suppress the fruits of the search of his home is GRANTED IN PART and DENIED IN PART.

11. The motions to suppress fruits of a search, filed by defendants Brocco, Majuri, and Saka, are DENIED.

12. The court RESERVES decision on defendants' motion to suppress interceptions pertaining to theft from interstate shipment (orders dated April 16, 1985, May 14,

1985, june 26, 1985, July 25, 1985), mail/wire fraud – "bust-out" (orders dated May 14, 1985, June 26, 1985, July 25, 1985); counsel are hereby ORDERED to appear on September 8, 1987 at 9:30 a.m. for further argument as to suppression of the above noted interceptions; defendants' motion to suppress as to all other interceptions is DENIED.

13. Defendants' joint and individual motions for leave to file further pretrial motions is GRANTED only to the extent that such motions are necessitated by the relief provided by this order. A schedule will appear in a supplemental order subsequent to the September 8, 1987 hearing.

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | : | Criminal |
| | : | #86-301 |
| v. | : | |
| GAETANO VASTOLA, RUDOLPH FARONE, LARRY MARTIRE AND ELIAS SAKA, | : | OPINION |
| Defendants. | : | |

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BROTMAN, District Judge:

INTRODUCTION

Presently before the court are the motions of defendants for various forms of pretrial relief. Specifically, defendants move (1) to dismiss the indictment, or in the alternative, to preclude the government from introducing undisclosed evidence at trial, and (2) to suppress, or in the alternative, exclude the 189 wiretap and room bug conversations which the government intends to introduce at trial. For the reasons discussed below, both motions must be denied in their entirety.

DISCUSSION

a. Dismissal of the Indictment

The defendants seek dismissal of the indictment or sanctions precluding the government from introducing undisclosed evidence at trial. Basically, the defendants allege that the Government violated the September 29, 1986 Order for Discovery and Inspection of this court as well as various other discovery Orders. In particular, defendants claim that they have not received (1) premarked exhibits (including a complete set of final transcripts), (2) existing *Brady* material, (3) certain logs and tapes, (4) business records of "Out of the Past" for March, 1985 through January 1986, (5) chain of custody envelopes for certain wiretaps, (6) statements of alleged prior

similar acts, (7) a redacted indictment, and (8) the "Ten-day Tapes."

After considering the parties' briefs and inquiring at oral argument as to the status of the various discovery matters listed above, it is clear to this court that defendants' motion must fail for several reasons. First, it was established at oral argument that many of the items listed above have already been produced by the government. For example, defendants have already received the redacted indictment, all *Brady* material, a complete set of final transcripts and substantially all of the logs and tapes. In addition, the government stated that it has produced all the business records for "Out of the Past" except for Rule 17 material from the trial of Morris Levy, *et al.* Furthermore, the government has produced for inspection all relevant chain of custody envelopes or has made those maintained in other districts available for inspection. The government also stated on the record that it does not intend to use any statements of alleged prior similar acts during this trial. Finally, concerning the "Ten-day Tapes," the delay in their production has been due not to any fault of the government but rather to a delay in the filing of the Order of this court setting forth the procedure for their production.

Second, defendants' brief presents absolutely *no* law supporting their motion. Indeed, in the only case cited by defendants which is remotely on point – *United States v. Starusko*, 729 F.2d 256 (3d Cir. 1984) – the Third Circuit actually found that the District Court had abused its discretion in not allowing a government witness to testify due to the government's "deliberate" failure to disclose exculpatory evidence where there was no prejudice to the

defendants. In the instant case the defendants have not alleged any prejudice or any "deliberate" disobedience by the government. Indeed, counsel for defendants conceded at oral argument that, while they have not yet received all pre-marked exhibits, they have had access to, and have used, the government's evidence room for the past two years. In addition, the government stated that the exhibits which have not yet been provided are those which will be used near the tail-end of its case, thereby giving defendants time to review them in the coming weeks.

Certainly, given the complexity and enormousness of this case, both sides must be tolerant of the problems their adversary faces in preparing for trial. Therefore, while the government must respect the need of defendants to have access to all evidence to which they are entitled, defendants must recognize, as does this court, that the government is proceeding in good faith and without undue delay in meeting its discovery obligations.

In the absence of any controlling authority, and in light of the fact that outstanding discovery is minimal and prejudice and bad faith are nonexistent, dismissal of the indictment is simply inappropriate. The court, however, feels compelled to caution both parties to timely meet their discovery obligations so as not to prejudice their adversaries or slow the wheels of justice.

b. Suppression of the Tapes

Defendants move to suppress or exclude the 189 wiretap and room bug conversations ("the tapes") which the government has expressed an intention to introduce

at trial. Defendants claim that the government violated Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and various court orders promulgated pursuant thereto.

First, the defendants claim that when the government released the tapes to Paul Ginsberg for the purposes of enhancing and copying them it violated 18 U.S.C. § 2517(1) and (2) because Ginsberg is not an "investigative or law enforcement officer." 18 U.S.C. § 2517(1). Section 2517(1) states that "[a]ny investigative or law enforcement officer" may disclose the contents of wiretaps to "another investigative or law enforcement officer." Since Ginsberg is merely a private citizen hired by the government essentially as an independent contractor, the defendants argue, the government has violated the statute.

Second, the defendants allege that the release of the tapes to Ginsberg violated New Jersey, New York, and Maryland federal sealing and unsealing orders. The New Jersey Orders provided for the tapes to be unsealed for the purposes of "pre-trial preparation" and to remain in the custody of the United States Attorney. The New York and Maryland unsealing orders both require the Federal Bureau of Investigation to retain custody of the tapes. In addition, each of the sealing orders provided that "except as provided by Section 2517 of Title 18, United States Code, the contents of said recordings shall be disclosed only upon the Order of this Court." Thus, argue the defendants, since the disclosure to Ginsberg was in contravention of § 2517 and of any court Order, suppression is required.

Besides giving their interpretation of the language of Title III, the defendants cite two cases in support of their motion. Neither case, however, is directly on point. In *United States v. Giordano*, 416 U.S. 505 (1974), the Supreme Court held that a wiretap which is not *authorized* by the Attorney General or a specially designated Assistant Attorney General violates Title III and must be suppressed. In *United States v. Chavez*, 416 U.S. 562 (1974), the Court reached the exact same conclusion; that improperly *authorized* wire interceptions should be suppressed. *Id.* at 571. Neither case held that improperly *disclosed* wiretaps should be suppressed. In fact, in both *Giordano* and *Chavez* the Court cited 18 U.S.C. § 2518(10)(a) as providing the circumstances under which wire intercepts could be suppressed:

> Any aggrieved person in any trial . . . may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that –
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

18 U.S.C. § 2518(10)(a). Clearly, the alleged unauthorized *disclosure* in this case is not covered by the language of the above statute.

The Government concedes that there may have been some "technical" violations of either the statute or specific Orders, but it argues, consistent with the Supreme Court's decisions above, that suppression is not the proper remedy. Besides gaining unsolicited support from the defendant's brief in the form of the two cases cited above, the government cites several cases explicitly supporting the proposition that suppression is not the proper remedy for improper disclosures.

In *United States v. Iannelli*, 477 F.2d 999 (3d Cir. 1973), *aff'd* 420 U.S. 770 (1975), the Third Circuit held that "the suppression remedy specified in 18 U.S.C. § 2518(10) applies to unlawful interceptions. A civil remedy applies to unlawful disclosures. 18 U.S.C. § 2520" *Id.* at 1001. *See also United States v. Vento*, 533 F.2d 838, 855 (3d Cir. 1976). In *Resha v. United States*, 767 F.2d 285 (6th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986), the court stated:

> "We construe § 2515 to permit suppression of evidence only if that evidence was derived from unlawful, improper or unauthorized *interceptions* of wire or oral communications. It does not authorize suppression for *disclosures* of such information, even it they violate § 2517. This determination is based upon the legislative history of the Act and court decisions that require § 2515 to be read 'in light of' 18 U.S.C. § 2518(10)(a). . . ."

*Id.* at 288 (emphasis in original). The *Resha* court went on to cite both *Giordano*, 416 U.S. 505, and *Chavez*, 416 U.S. 562, as support for this position.

There are two additional persuasive arguments against defendants' motion. First, the government notes that 18 U.S.C. § 2517(2) allows any investigative or law

enforcement officer to use lawfully intercepted communications "to the extent such use is appropriate to the proper performance of his official duties." 18 U.S.C. § 2517(2). Since part of the U.S. Attorney's "official duties" are to prepare evidence for trial and for production to the defendants, the release of the tapes to Ginsberg can be seen as consistent with the statute. In addition, as noted above, all the sealing orders in this case state that "[e]xcept as provided by Section 2517 of Title 18, United States Code, the contents of said recordings shall be disclosed only upon the Order of this Court." Therefore, since disclosure was allowed by § 2517(2), it did not violate the court orders. What makes this argument all the more compelling is that the disclosure of the tapes to Ginsberg was done so that he could merely filter out background noise thus making the voices more intelligible and so that he could make high-quality copies for use by the defendants and at trial.

Second, the government claims, and this court agrees, that there has been no showing by the defendants that the tapes were tainted in any way by their disclosure to Ginsberg. As Ginsberg states in his letter to the Government, the word "enhanced" is really a misnomer, as what is actually done is "subtraction or elimination of offending sounds" which "may mask conversation." *See* Exhibit E to Defendants' Memorandum of Law. In addition, states Ginsberg, "the filter settings are adjusted so as not to affect human speech" and it is *copies* of the original tape which are enhanced; the original tape is not changed in any way. *See Id.*

Since there exists an additional "original" set of tapes which were not released to Ginsberg and which can be

compared to the set that was released, and since the government will still have to establish a chain of custody before introducing the tapes at trial, the court does not see how the defendants have been prejudiced at this point in time. If it appears at trial that the integrity of the tapes have been compromised, this court may find itself disposed to grant defendants appropriate relief. In the meantime, however, defendants' motion must be denied.

An appropriate Order will be entered.

/s/ Stanley Brotman
STANLEY S. BROTMAN
UNITED STATES
DISTRICT JUDGE

DATED: October 17, 1988

## OPINION OF THE DISTRICT COURT

Dated April 28, 1989

On March 2, 1989, A jury convicted defendant Gaetano Vastola on counts one, two, three, four, and nine of the government's superseding indictment. The same jury returned guilty verdicts against defendant Saka on counts one, two, three, four, six, seven, nine and 12 through 26 of the same indictment. Both defendants were found not guilty on counts five, eight and 10 and defendant Vastola was acquitted on counts seven, 23, 24 and 26. Finally, the jury deadlocked as to Vastola on counts six and 11.

At the close of the government's case both defendants moved for judgments of acquittal pursuant to Federal Rule of Criminal Procedure 29(a) and the court denied those motions. At the close of defendants' case they both made renewed motions for judgments of acquittal and the court reserved its decision pursuant to rule 29(b). Now, defendant Saka has moved, pursuant to rule 29(c), for a judgment of acquittal on all counts on which he was convicted and defendant Vastola has similarly moved for a new trial, pursuant to Rule 33, on counts four and nine. For the reasons discussed below, the court will deny all of defendants' outstanding Rule 29 and Rule 33 motions, except for defendant Vastola's motion for a judgment of acquittal on count one. The court will vacate Vastola's conviction on count one and enter a judgment of acquittal.

Discussion.

A. The Rule 29 Motions.

In ruling on a motion for a judgment of acquittal, the court "must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *United States vs. Gross*, 375 F. Supp. 971, 973 (D.N.J.) (quoting *Curley vs. United States*, 160 F.2d 229, 232 (D.C. Cir. 1947)), affirmed, 511 F.2d 910 (3d Cir. 1974), *cert. denied*, 423 U.S. 924 (1975). In making its determination under Rule 29, the court must view the evidence in the light most favorable to the government and must give it the benefit of all legitimate inferences. *See United States v. Ashfield*, 735 F.2d 101, 106 (3d Cir.), *cert. denied*, 469 U.S. 858 (1984) (citing *Glasser vs. United States*, 315 U.S. 60, 80 (1942)); *United States vs. Gross*, 375 F. Supp. at 973. *See also, United States vs. Pratt*, 429 F.2d 690 F. Supp. 1388 (E.D. Pa. 1983):

If there is sufficient evidence in the record upon which a rational jury could find beyond a reasonable doubt that the government has proved all elements of the offenses charged, a motion for a judgment of acquittal may not be granted. *United States vs. Pratt*, 429 F.2d 690 (3d Cir. 1970); *United States vs. Doan*, 710 F.2d 124, 126-27 (3d Cir. 1983).

1. Defendant Vastola.

Count 1.

The jury convicted defendant Vastola on count one of the indictment which charged him with violating the

federal racketeering law, 18 United States Code section 1962(c). In order for the defendant to have been convicted under section 1962(c), as it was charged in the indictment, the jury must have found beyond a reasonable doubt that Vastola engaged in a "pattern of racketeering activity" which the court defined for the jury in its charge, at the request of the government, as follows:

To find that a defendant engaged in a "pattern of racketeering activity," you must find that he committed, or aided and abetted in the commission of at least two acts of racketeering activity, within ten years of each other, one of which must have ocurred after October 15, 1970. I note that his definition is taken directly from the Racketeering Statute itself, 18 United States Code section 1961(5).

In paragraph four of count one of the superseding indictment, the government set forth the four separate racketeering acts which Vastola was alleged to have committed. The first "racketeering act" charged by the government alleged that the defendant used and conspired to use "extortionate means to collect extensions of credit from Out of the Past, Ltd." It is crucial to note that the government also broke up this single "racketeering act" into four additional counts, counts four, five, nine and 10 with which it also charged Vastola. However, the government charged all four of these counts as a single racketeering act. The other three "rackeetering acts" were: conspiring to make extortionate loans and to use extortionate means to collect loans, also charged as separate offenses, under counts six and seven; an extortionate loan made to Daniel Zack, also count 11; and fraudulently

concealing and transferring property of Dispodype, Inc., to defeat the bankruptcy laws, also counts 24 and 26.

The jury returned guilty verdicts against defendant Vastola on counts one, two, three, the three RICO counts, and counts four and nine only. Vastola was acquitted on counts five, seven, eight. 10, 23, 24 and 26 and the jury deadlocked as to counts six and 11. Since counts four and nine were charged by the government as a single "racketeering act," and Vastola was not convicted on any of the other counts which make up the other racketeering acts, it is clear from the jury's verdict that it found that the defendant had committed only one of the four predicate acts alleged by the government under count one. Therefore, defendant Vastola's conviction cannot stand as to count one of the indictment and the court will enter a judgment of acquittal.

While I am hesitant to disturb a jury verdict in any case, it is clear that this one, on count one, must be vacated. The subsection of the RICO statute by its very language requires the commission of two "acts of racketeering" but in this case the jury unanimously found only one such act. To allow such a verdict to stand would be in direct contravention of the language and spirit of the racketeering statute. The government chose to hcarge the predicate acts the way it did, and it, and not the defendant must suffer the consequences of an unartfully drafted indictment or a failure of proof.

I note that the government's reliance on *United States vs. Powell*, 469 U.S. 57 (1984) and *Dunn vs. United States*, 284 U.S. 390 (1932), for the dproposition that the court

should not disturb an inconsistent jury verdict is misplaced. The government must recognize that the RICO law is a special animal which substantially expands the power of the United States to punish certain "paterns" of criminal activity. Furthermore, to find that a defendant engaged in a "pattern of racketeering activity" under section 1962(c) the jury must find at least two predicate acts. Congress specifically and explicitly wrote this requirement into the law; where there are not two predicate acts, as here, there can be no pattern of racketeering activity; and if there is no pattern of racketeering activity, the defendant cannot be convicted as charged in the indictment. In essence, the predicate acts are "building blocks" which make up the pattern of racketeering activity. Without the right number of "building blocks", in this case, it is impossible to build a RICO violation. Therefore, what we have in this case is not just an inconsistent verdict, but also a verdict that is a legal impossibility and this court will not close its eyes to such legal impossibilities.

The court is aware of only one case in which a court applied the logic in *Dunn* and *Powell* to the RICO statute. However, in that case, *United States vs. Tinsley*, 800 F.2d 449 (4th Cir. 1986), the Fourth Circuit Court of Appeals simply quoted at length from *Powell* without analyzing its application to the RICO statute. I am satisfied that such analysis would have convinced the court that the *Powell/Dunn* rule should not apply to a case such as this. Therefore, the court declines to follow *Tinsley* and will vacate defendant Vastola's conviction on count one and enter a judgment of acquittal.

B. Count 2.

Defendant Vastola makes two main arguments for why the court should enter a judgment of acquittal on count two. First, he asserts that counts one and two are multiplicitous and, thus, he should not have been charged and convicted of both. This court was confronted with this same argument in the pre-trial setting at which time it denied defendant's motion to force the government to choose between charging counts one and two. The court sees no reason to change its earlier ruling, especially in light of the fact that defendant's conviction on count one, the defendant makes the supplementary argument that the very charging of the multiplicitous counts somehow unduly prejudiced him in the eyes of the jury. In light of the gravity of the case as a whole, however, the court finds this argument to be without merit.

In addition, Vastola argues that the evidence adduced at trial was clearly insufficient to withstand a rule 29 motion. The court disagrees. In light of the above rule 29 standard, which is extremely deferential to the jury's ability to find facts, the court feels that the evidence was more than sufficient for a rational jury to find guilt beyond a reasonable doubt. This court sat through several weeks of testimony and has reviewed tapes, exhibits and the trial transcript and it is convinced that sufficient evidence was adduced on count two for a jury to convict the defendant.

As for Vastola's argument that proving only one unlawful debt is insufficient to establish a RICO violation, that contention is in direct contravention of the only case cited by either party which deals with the issue. In *United*

*States vs. Pepe*, 747 F.2d 632 (11th Cir. 1984), the Eleventh Circuit Court of Appeals held that, under 18 United States Code, section 1962(c), "To establish the collection of unlawful debt, only one act of collection must be shown." *Id.* at 645. Defendants have not provided this court with any case law refuting this holding and the court finds it to be the correct statement of the law, just as it charged the jury:

> I instruct you that you must be unanimous on at least one of the debts charged in the indictment to convict on this count. You must acquit the defendant if you are not unanimous on at least one of the charged debts.

Jury charge at 73.

Therefore, the court will deny defendant Vastola's motion for a judgment of acquittal on count two.

C. Count 3.

Defendant Vastola argues that his conviction on count three, the RICO conspiracy, was not supported by the weight of the evidence. Once again, after reviewing the trial transcript and exhibits, the court is forced to disagree. The court does not agree with the government that, somehow, *United States vs. Powell*, 469 U.S. 57 (1984), discussed above, estops the defendants from contesting, or the court from reviewing, Vastola's conviction on count three. However, given the special nature of proof required for a RICO conspiracy, *see e.g., United States vs. Adams*, 759 F.2d 1099 (3d Cir.), *cert. denied*, 474 U.S 971 (1985); *United States vs. Pepe*, 747 F.2d 632 (11th Cir. 1984),

the court finds that a rational jury could have found guilt beyond a reasonable doubt on count three. Therefore, the court will deny defendant Vastola's motion for a judgment of acquittal on count three.

2. Defendant Saka.

Defendant Saka moves this court for judgment of acquittal on each of the 22 counts on which he was convicted. In essence, Saka contends that there was insufficient evidence for him to have been convicted on any of the counts. The court finds that this position lacks any merit whatsoever.

After presiding over the trial and reviewing all the evidence in this case, the court is compelled to borrow a phrase from the government's brief and agree that "the evidence against Saka was overwhelming." One need only review the legion of tapes entered into evidence by the government to see that Saka was tried and convicted on his own words. In arguing that the evidence was insufficient, however, counsel for defendant Saka relies exclusively on the testimony of witnesses presented at trial. While the court disagrees with the argument of defendant concerning the interpretation of this witness testimony in any event, it also finds that the tape recordings of conversations between Saka and various other individuals painted a clear picture of Saka's involvement in, and culpability for, all of the charges of which he was convicted. Therefore, the court must deny the motion of defendant Saka for judgments of acquittal of each of the 22 counts of which he was convicted.

B. The Rule 33 motions.

The court, in evaluating a motion for a new trial, must "examine the weight, rather than the sufficiency of the evidence . . . ," *United States vs. Messerlain*, 633 F. Supp. 1493, 1513 (D.N.J. 1986) (citing *Tibbs vs. Florida*, 457 U.S. 31 (1982)), and, in doing so, the court may "assess the credibility of the witnesses." *United States vs. Clemons*, 658 F. Supp. 1116, 1119 (W.D. Pa. 1987). The court "need not view the evidence in the light most favorable to the verdict," *United States vs. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980), "but may set aside a verdict and grant a new trial only if it determines that the verdict constitutes a miscarriage of justice." *United States v. Mastro*, 570 F. Supp. 1388, 1390 (E.D. Pa. 1983) (citing *United States VBS. Phifer*, 400 F.Supp. 719, 723 (E.D. Pa. 1975), affirmed 532 F.2d 748 (3d Cir. 1976)).

In short, then, a new trial may be granted pursuant to Federal Rule of Criminal Procedure 33, "If there is a reasonable probability that the trial error could have had a substantial influence on the jury's decision." *Mastro*, 570 F. Supp. at 1388, citing *Government of the Virgin Islands vs. Bedford*, 671 F.2d 758, 762 (3d Cir. 1982)).

Defendant Vastola has moved for a new trial on counts four and nine, the conspiracy convictions. Basically, defendant argues that the jury was mislead and prejudiced by certain "organized crime" references made during the trial. These references include: (1) statements by certain agent-witnesses that they were members of certain "organized crime" task forces; (2) a taped conversation admitted into evidence in which defendant Saka used the word, "Mafia" to describe a certain group of

people, including claims defendant Vastola, for the purposes of this motion, Vastola himself; and (3) a statement by FBI agent Mahoney about John La Monte and his family being placed in FBI protective custody. Based on the standard set forth above, the court is compelled to deny defendant's motion.

Defendants are entitled to a fair trial, not a perfect one. *Delaware vs. Van Arsdall*, 475 U.S. 673, 681 (1986), citing *United States vs. Hasting*, 461 U.S. 499, 508-09 (1983), *cert. denied* 469 U.S. 1218 (1985)); *Bruton vs. United States*, 391 U.S. 123, 135 (1968). Throughout the course of this trial, the court made every effort to exclude from the jury's hearing explicit and implicit references to organized crime which the court felt to be irrelevant to the jury's determination of the defendant's guilt and potentially prejudicial to defendant's due process rights. The court feels that, on the whole, it succeeded in that endeavor. On the one occasion where a possibly prejudicial comment did find its way before the jury, when agent Mahoney inadvertently noted that John La Monte and his family were placed in protective custody, the court ordered the jury to disregard it:

Ladies and Gentlemen, you are to disregard the agent's testimony regarding the reasons why John La Monte's active cooperation ended and you should not consider it during your deliberations for any reason. I am ordering it stricken from the record read to the jury on February 22, 1989. The court must assume that the jury followed its admonition. Furthermore, to the extent that the above references could be seen as constituting trial error, their effect, taken by themselves or cumulatively, cannot be said to have so tainted the jury's deliberations

as to deprive defendant of a fair trial. Therefore, the court will deny Vastola's request for a new trial on counts four and nine.

The court will enter the following order:

The matter having come before the court on motions of defendant Gaetano Vastola and Elias Saka for judgment of acquittal, new trial pursuant to Federal Rule or Criminal Procedure 29 and 33 respectively, the court having considered the submissions of the parties and arguments of counsel, and for the reasons set forth in the court's opinion read into the record this date, it is on the 28th day of April hereby ordered that the motions of Gaetano Vastola for judgment of acquittal on count one of the superceding indictment is granted.

It is further ordered that motion of defendant Gaetano Vastola for a judgment of acquittal on counts two and three and for a new trial on counts four and nine is denied.

It is further ordered that the motion of defendants Elias Saka for acquittal of each of the counts of the superseding indictment is denied.

Supreme Court, U.S.
FILED
JUN 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1575

(2)

# In the Supreme Court of the United States

OCTOBER TERM, 1989

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GAETANO VASTOLA, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES

---

KENNETH W. STARR
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EDWARD S.G. DENNIS, JR.
*Assistant Attorney General*
RICHARD A. FRIEDMAN
*Attorney*
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## QUESTIONS PRESENTED

1. Whether the government was required to provide a "satisfactory explanation" (18 U.S.C. 2518(8)(a)) for a delay in sealing tape recordings that were produced pursuant to court-authorized electronic surveillance.

2. Whether petitioner's convictions must be reversed because the government released the tape recordings to a private contractor for authentication and electronic enhancement after the court ordered the tape recordings unsealed.

3. Whether inconsistency among the verdicts returned by the jury requires reversal of any of petitioner's convictions.

4. Whether conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(d), requires proof that the defendant agreed personally to commit the predicate unlawful act or acts.

5. Whether there was sufficient evidence to show that petitioner conspired to conduct the affairs of a racketeering enterprise through the collection of an unlawful debt.

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# In the Supreme Court of the United States

OCTOBER TERM, 1989

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No. 89-1575

GAETANO VASTOLA, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-75) is reported at 899 F.2d 211. The opinion of the district court (Pet. App. 76-167) is reported at 670 F. Supp. 1244. Subsequent opinions of the district court (Pet. App. 168-176, 177-187) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 20, 1990. The petition for a writ of certiorari was filed on April 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was found guilty of two substantive offenses under the Racketeer Influenced and Corrupt Organizations Act (RICO) (Counts 1 and 2), in violation of 18 U.S.C. 1962(c); a RICO conspiracy offense (Count 3), in violation of 18 U.S.C. 1962(d); conspiracy to use extortionate means to collect an extension of credit (Count 4), in violation of 18 U.S.C. 894; and conspiracy to obstruct commerce by means of extortion (Count 9), in violation of 18 U.S.C. 1951. The district court granted petitioner's post-conviction motion for a judgment of acquittal on the Count 1 RICO offense. Petitioner was sentenced to a total of 20 years' imprisonment and a $70,000 fine. Pet. App. 4.[1] The court of appeals reinstated the Count 1 RICO conviction, reversed petitioner's conviction on the Count 2 RICO offense, and affirmed the other convictions. The court then remanded the case for resentencing and entry of a corrected judgment.

1. The relevant facts are stated in the court of appeals' opinion. Pet. App. 4-16. Petitioner was indicted with 19 other defendants in a 114-count indictment charging a variety of crimes. After the district court ordered a separate trial for petitioner Vastola and co-defendant Elias Saka, they were tried together on a 26-count superseding indictment that named petitioner in 14 counts and Saka in 25.

The indictment charged petitioner and Saka, his principal lieutenant, with operating a RICO enterprise through the commission of various crimes (including a conspiracy to use and the use of extortionate means to collect an extension

[1] Co-defendant Elias Saka was found guilty of the five offenses of which petitioner was convicted, as well as various other extortion and fraud offenses. He was sentenced to a total of 20 years' imprisonment and a $185,000 fine.

of credit), numerous usurious loans, schemes to defraud suppliers of businesses controlled by the enterprise, and insurance and bankruptcy frauds. Two of those schemes are relevant to the five counts on which the jury convicted petitioner. Pet. App. 6.

One scheme involved a usurious loan to Joseph Dwek, who arranged to borrow $15,000 from Saka, with interest payable at a rate of $250 per week. Dwek fell behind on his payments, and on May 7, 1985, Saka threatened to strangle Dwek if he did not pay what he owed. The evidence showed that petitioner was aware of the loan to Dwek and advised Saka in his efforts to collect the debt. Pet. App. 7-10.

The second scheme relevant to petitioner's convictions involved the purchase of a large quantity of records and tapes by Salvatore Pisello. The sale price, approximately $1.75 million, was guaranteed by a company owned by Morris Levy, one of petitioner's co-conspirators. Pisello and Levy asked petitioner to find a buyer for the records and tapes, and he recommended John LaMonte, who owned a record distribution company. A sale to LaMonte was made in the summer of 1984, and the goods were delivered to him. LaMonte agreed to pay $2.05 million for the merchandise; the $300,000 profit was to be split among petitioner, Pisello, and Levy. Problems arose when LaMonte failed to complete payment on the sale. Levy urged petitioner to cause LaMonte to pay the amounts due. Petitioner's efforts in that regard were reflected in his January 1985 statement to a confederate that, if LaMonte failed to cooperate, he would put him in the hospital. In fact, during a May 1985 meeting to discuss the debt, petitioner hit LaMonte in the face, causing him to be hospitalized for at least four days. The efforts to induce LaMonte to pay the debt continued until October 1985. Pet. App. 10-16.

2. The government's evidence at trial consisted primarily of tape recordings that were the products of court-authorized and consensual electronic surveillance. The recordings captured conversations among the conspirators between late 1984 and October 1985 and conversations that LaMonte had with the conspirators between May and September 1985.

The electronic surveillance of Vastola's warehouse, the headquarters of the RICO enterprise, ended on March 25, 1985. Although Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2518(8)(a), requires recordings of intercepted conversations to be sealed "[i]mmediately upon the expiration of the [intercept] order," the tapes were not sealed until July 15, 1985. Pet. App. 63 & n.33.

After the tapes were sealed, the government moved to unseal a number of them temporarily prior to trial. In response, the courts with jurisdiction to do so ordered a number of the tapes unsealed to facilitate trial preparation. The government then sent a set of the unsealed tapes to Paul Ginsberg, an expert in tape recording technology whom the government had employed to "filter" them, *i.e.*, to make copies with the extraneous noises removed. The government retained an identical set of original tapes when it sent one set to Ginsberg for filtering. Ginsberg kept the tapes for approximately 35 days. In addition to filtering the tapes, he tested them to determine whether they had been tampered with in any way and determined that they had not. The evidence showed that Ginsberg took appropriate precautions to ensure that the tapes were not tampered with while they were in his custody, and there was no evidence that the original tapes had been altered in any manner. Pet. App. 63-65.

The district court rejected petitioner's motions to suppress the tape recordings because of the delay in sealing and

because of the transfer of custody to Ginsberg. Relying on *United States* v. *Falcone*, 505 F.2d 478, 484 (3d Cir. 1974), the court held that suppression was not required so long as the integrity of the tape recordings was established. The court accordingly did not require the government to explain the reason for the delay, nor did the court find any reason to suppress the conversations because a set of original tapes was transferred to Ginsberg after they were ordered unsealed. Pet. App. 158-159, 172-176.

3. The jury returned inconsistent verdicts. Count 1 of the superseding indictment charged petitioner with conducting an enterprise through a pattern of racketeering activity and alleged four predicate acts, each of which was defined by reference to other counts of the indictment. The first predicate act alleged against petitioner was his participation in the conspiracy to use extortionate means to collect LaMonte's debt. The portion of the RICO count that charged that predicate act referred to acts that were separately charged in Counts 4, 5, 9, and 10. The second predicate act was petitioner's participation in a conspiracy to make usurious loans and to use extortionate means to collect them, as separately charged in Counts 6 and 7. The third predicate act was an extortionate loan to Daniel Zack, as separately charged in Count 11. The fourth predicate act was petitioner's fraudulent transfer of property in violation of the bankruptcy laws, as separately charged in Counts 24 and 26.

The jury convicted petitioner of the Count 1 RICO offense, but it returned a verdict of acquittal or deadlocked on each of the substantive offenses that were cross-referenced as the second, third, and fourth predicate acts. The jury convicted petitioner of the offenses charged in Counts 4 and 9, but those offenses both came within the scope of the first predicate act alleged in Count 1. Pet. App. 22-24.

The RICO substantive offense charged in Count 1 required proof that petitioner committed two of the alleged predicate acts. The district court reasoned that the jury had convicted petitioner of offenses comprising one predicate act only; the court therefore granted petitioner's post-conviction motion to set aside the guilty verdict on Count 1 as legally insufficient. Pet. App. 178-181.

4. On the government's appeal, the court of appeals reinstated petitioner's conviction on Count 1 subject to further proceedings on remand. Pet. App. 22-32. The court found that the jury had been properly instructed on the elements required for a conviction on the RICO count, and that even if the verdict on Count 1 was inconsistent with the verdicts on the related counts that charged the predicate acts, that would not justify vacating the conviction on Count 1. The court of appeals left for determination on remand the question whether the evidence was sufficient to support petitioner's conviction on Count 1.

The reinstatement of the guilty verdict on Count 1 resolved the government's appeal. Petitioner took a separate appeal on the counts on which he had been convicted. The court of appeals held that the evidence was sufficient to support the convictions on Counts 4 and 9. Pet. App. 42. The court, however, reversed petitioner's conviction on Count 2, which charged that petitioner had participated in a RICO enterprise through the collection of an unlawful debt. Pet. App. 32-37. The jury had indicated in a special interrogatory that it based its conviction on Count 2 solely on the conclusion that petitioner participated in the unlawful debt collection from Joseph Dwek. While the statute provides that the offense charged, 18 U.S.C. 1962(b), may be committed by a defendant operating a RICO enterprise through the collection of a single unlawful debt, the court of appeals found the evidence insufficient to show that petitioner

had personally participated in the collection of the Dwek debt, as alleged in the indictment.

On the other hand, the court of appeals found the evidence sufficient to uphold petitioner's conviction on the Count 3 RICO conspiracy charge, which alleged that petitioner had conspired to participate in a RICO enterprise through a pattern of racketeering activity, as defined in Count 1, and through use of extortion in the collection of various debts enumerated in Count 2. Pet. App. 37-42. The jury indicated in a special interrogatory on Count 3 that it had based its verdict on both a pattern of racketeering activity and the collection of an unlawful debt. The court of appeals reasoned that it could extrapolate from the jury's special interrogatory on Count 2 that the unlawful debt that supported the Count 3 RICO conspiracy conviction was the Dwek debt. To conclude otherwise would be to assume an inconsistent verdict when there was a reasonable assessment of the jury's action that would yield a fully consistent verdict.

The court of appeals held that the evidence was sufficient to show that petitioner had conspired to operate the enterprise through the collection of the Dwek debt, even though the evidence was insufficient to prove that he had personally participated in the collection of that debt. The court held that the agreement alone, without petitioner's personal participation in the collection of the debt, was sufficient to support the RICO conspiracy conviction. Because the court sustained the RICO conspiracy conviction on the basis of the unlawful debt, it did not consider the sufficiency of the evidence to support the RICO conspiracy conviction on the basis of a pattern of racketeering activity.[2]

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[2] The court of appeals also affirmed the district court's ruling admitting the tapes despite the sealing delay and the temporary transfer of custody to an outside expert. In accordance with circuit precedent,

## DISCUSSION

This case should be remanded for reconsideration in light of *United States* v. *Rios*, No. 89-61 (Apr. 30, 1990), which rejects the analysis of the sealing requirement used by the courts below. The remaining issues raised in the petition do not merit review by this Court.

1. There was a delay of more than three months in sealing the tape recordings after the termination of electronic surveillance at petitioner's warehouse. Although the government did not explain the reason for the delay, the tapes were admitted at trial because they were shown to be in their original, unaltered form. In *Rios*, however, this Court concluded (slip op. 7) that "the 'satisfactory explanation' language in § 2518(8)(a) must be understood to require that the Government explain not only why a delay occurred but also why it is excusable." Because the court of appeals held that the unchallenged integrity of the tape recordings established their admissibility, the petition should be granted, the judgment of the court of appeals vacated, and the case remanded for reconsideration in light of *Rios*.[3]

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the court of appeals found that the district court's unchallenged finding regarding the integrity of the tapes was dispositive. Pet. App. 62-73.

[3] Both the district court and the court of appeals denied the motion to suppress solely on the basis of the tapes' integrity; there has thus not yet been any inquiry into the reason for the delay. The court of appeals accordingly may wish to remand the case to the district court for a hearing at which the government can explain the reason for the delay; the district court can then determine whether that explanation is "satisfactory." In *Rios*, respondents contended that the explanation for the delay offered on appeal was a *post hoc* rationalization, rather than the real reason for the delay. The Court accordingly remanded for a determination whether the record showed that the "satisfactory explanation" for the delay presented by the government on appeal was the same as the explanation provided to the district court by the individual responsible for the delay. Slip op. 8-9. Nothing in *Rios* bars

2. Petitioner also contends (Pet. 11) that the tape recordings should not have been admitted, because the government provided a set of the original tapes to a private individual for 35 days for authentication and filtering.

Petitioner acknowledges (Pet. 11) that this issue must be resolved separately from the sealing delay issue. Unlike the delay in sealing, the consequences of an unauthorized transfer of custody to a third party is not governed by 18 U.S.C. 2518(8)(a) or any other provision of the federal wiretap statute. Section 2518(8)(a), by its terms, applies only to procedures for recording and sealing; it says nothing about the handling of the tapes after they are unsealed. The statutory analysis of the Court in *Rios* is therefore inapplicable to the question whether the tape recordings should be suppressed because they were provided to a private party without court authorization after the courts ordered them unsealed.

Because the wiretap statute does not speak to that issue, it is properly viewed as an evidentiary matter governed by the Federal Rules of Evidence. In light of the evidence before the district court it is clear that the tapes were properly admitted under governing evidentiary principles. As the court of appeals noted (Pet. App. 72), "compelling" evidence established that the tapes in this case were unaltered. The district court and the court of appeals were therefore correct in finding the tapes to be authentic and thus not to be subject to exclusion at trial. See Fed. R. Evid. 901.

There is no reason to accept petitioner's unsupported assertion (Pet. 11) that suppression should be ordered in this case because it is difficult to determine whether tapes

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the government from presenting on remand the explanation for the delay in this case. The district court must, of course, find that the explanation given is the actual reason for the delay, not simply a *post hoc* rationalization.

have been tampered with. As the court of appeals noted (Pet. App. 72-73), the uncontroverted evidence before the district court was that tampering can be detected by competent experts in the field of electronic enhancement, and the defendants did not seriously contend in the courts below that the tapes were subject to tampering.

Petitioner cites no authority to support his claim that release of unsealed electronic surveillance recordings to a private party without court authorization or in violation of the terms of an unsealing order require suppression of the evidence. This issue is therefore a very narrow one—and apparently one of first impression—that does not call for this Court's review.

3. Petitioner next contends (Pet. 12) that the inconsistency between the verdict on the Count 1 RICO offense and the verdicts on the substantive offenses that served as the predicate acts for Count 1 require that the conviction on Count 1 be vacated. Petitioner argues (*ibid.*) that this Court's holding in *United States* v. *Powell*, 469 U.S. 57 (1984), that a conviction is not to be vacated merely because it cannot rationally be reconciled with verdicts of acquittal on other charges, does not apply "to the unique circumstances of RICO trials." Petitioner offers no authority for his position; in fact, two other courts of appeals have applied *Powell* in the RICO context. *United States* v. *Tinsley*, 800 F.2d 448, 450-452 (4th Cir. 1986); *United States* v. *Neapolitan*, 791 F.2d 489, 505 (7th Cir.), cert. denied, 479 U.S. 940 (1986). *Powell* itself involved a conviction for compound offenses in which the jury had acquitted the defendant of each of the predicate crimes charged in the indictment. There is no reason for a different rule in the closely analogous context presented in this case, and petitioner does not suggest one.

Petitioner argues (Pet. 12-13) that the analysis of the jury's verdict suggests that it misunderstood its instructions and

erroneously believed that petitioner's guilt of the offenses alleged in Counts 4 and 9—the two offenses of which he was separately convicted—was sufficient to support the RICO conviction on Count 1. But to attempt to divine what the jury thought it was doing is to disregard the central principle of *Powell*: that there are many reasons why a jury may elect not to convict on a particular count even though there is sufficient evidence to support a conviction. *Powell* teaches that if there is sufficient evidence of guilt on challenged counts so that verdicts of conviction can stand on their own, a court may not attempt to discern the jury's reasons for acquittals on other counts and apply those reasons to conclude that a verdict of conviction on some counts should be vacated because it is inconsistent with the acquittals on other counts.

4. Petitioner asks this Court (Pet. 13-14) to resolve a conflict in the circuits over whether a conviction under the RICO conspiracy provision, 18 U.S.C. 1962(d), requires that the defendant participate personally in the predicate acts alleged, or whether it is enough to show that the defendant has entered into an agreement to operate the RICO enterprise by means of those predicate acts. Petitioner further argues (Pet. 14-15) that the evidence could not have been sufficient to support the Count 3 RICO conspiracy conviction based on the collection of an unlawful debt if the evidence was insufficient to support the Count 2 substantive RICO violation grounded on the collection of that same debt. Finally, petitioner argues (Pet. 16) that the court of appeals should not have relied on the jury's special interrogatory response respecting the Count 2 RICO conviction to construe the jury's Count 3 RICO conspiracy verdict. None of these related claims is ripe for decision at this time and, in any event, they are without merit.

The court of appeals did not pass on the question whether the evidence that petitioner committed a pattern of

racketeering acts was sufficient to support the reinstated Count 1 RICO conviction. That issue will be addressed by the district court if it is raised by petitioner after the guilty verdict on Count 1 is reinstated following remand. If the district court concludes that the evidence is sufficient to support petitioner's conviction on Count 1, that will provide an independent ground to support the Count 3 RICO conspiracy conviction, because the jury indicated in a special interrogatory that it had based the RICO conspiracy conviction both on the pattern of racketeering activities alleged in Count 1 and on the collection of an unlawful debt alleged in Count 2. Thus, the issues petitioner raises relating to the court of appeals' ruling on the Count 3 RICO conspiracy conviction are not yet ripe for review. After further proceedings on remand, those issues may become inconsequential to the resolution of petitioner's challenge to his conviction on Count 3.

In any event, petitioner's construction of the RICO conspiracy offense and its application to the facts of this case lack merit. The crime of conspiracy typically requires proof of an agreement whose objective is the commission of one or more unlawful acts. See *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). There is no requirement that each conspirator participate personally in the illegal act or acts that constitute the objectives of the conspiracy. On the contrary, a conspirator may be convicted upon a showing that he agreed to participate in the conspiracy with knowledge of its essential objectives. *E.g.*, *United States* v. *Carter*, 721 F.2d 1514, 1528 n.21 (11th Cir.), cert. denied, 469 U.S. 819 (1984).

In accordance with these basic principles of conspiracy law, the RICO conspiracy statute simply requires that the defendant agree to participate in an enterprise, understanding and agreeing that the enterprise's affairs will be con-

ducted through the commission of a pattern of racketeering activity or through the collection of an unlawful debt. There is no suggestion in the text or the legislative history of the RICO statute that when Congress enacted RICO it intended to depart from the general principles of conspiracy law. Far from imposing the additional restriction on the prosecution that petitioner urges, Congress intended that the RICO statute be liberally construed to achieve its objectives of combatting organized crime. See *Russello* v. *United States*, 464 U.S. 16 (1983); *United States* v. *Turkette*, 452 U.S. 576, 588-589 (1981). The evidence plainly was sufficient in this case to show that petitioner agreed to participate in the operation of his RICO enterprise knowing that one of the methods of its operation was the collection of unlawful debts, specifically the Dwek debt. The court of appeals correctly rejected petitioner's legal and factual arguments to the contrary.

As petitioner points out, two circuits have stated that a RICO defendant must agree to participate in the conduct of the enterprise through his own commission of the required predicate acts. *United States* v. *Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984). Those two early decisions, however, have been rejected by every other court of appeals that has subsequently ruled on the issue. See *United States* v. *Adams*, 759 F.2d 1099, 1116 (3d Cir.), cert. denied, 474 U.S. 971 (1985); *United States* v. *Joseph*, 781 F.2d 549, 554 (6th Cir. 1986); *United States* v. *Neapolitan*, 791 F.2d 489, 494-498 (7th Cir.), cert. denied, 479 U.S. 940 (1986); *United States* v. *Leisure*, 844 F.2d 1347, 1367 (8th Cir. 1988), cert. denied, 488 U.S. 932 (1988); *United States* v. *Tille*, 729 F.2d 615, 619 (9th Cir.), cert. denied, 469 U.S. 845 (1984); *United States* v. *Carter*, 721 F.2d 1514, 1529

(11th Cir.), cert. denied, 469 U.S. 819 (1984).[4] Moreover, the decisions in *Winter* and *Ruggiero* do not present an irreconcilable conflict with the decision in this case.

Although *Winter* contains dicta contrary to the ruling in the majority of the circuits, the issue petitioner raises here was not raised in the *Winter* case. The jury in *Winter* was instructed that a conviction would require an agreement to commit the predicate acts personally – an instruction unduly favorable to the defendant. The defendants argued on appeal that a RICO conspiracy requires that each of the defendants actually commit the predicate acts. The First Circuit rejected that argument. The court's statement that a RICO conspiracy requires only an agreement to commit the required predicate acts personally was based on a broad reading of language in an earlier decision from another circuit, which the same court read more narrowly in a later case.[5] The First Circuit's language in *Winter* is therefore dictum, and in light of the discredited underpinnings of that dictum as well as the subsequent contrary decisions of other circuits, the First Circuit may well disavow that position when the occasion arises.

The Second Circuit in *Ruggiero* did reverse a conviction for RICO conspiracy, but the court's analysis of the nature of the RICO conspiracy agreement was not necessary to its decision. The indictment had charged defendant Tomasulo with RICO conspiracy based on two predicate acts. One of the two was held to be legally insufficient on appeal. The court therefore concluded that the single surviving predicate

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[4] The Eleventh Circuit decided the *Carter* case five days before the Second Circuit's decision in *Ruggiero*, but the panel in *Ruggiero* was apparently not aware of the decision in *Carter*.

[5] The court relied on ambiguous language in *United States* v. *Elliott*, 571 F.2d 880, 902 (5th Cir.), cert. denied, 439 U.S. 953 (1978). The court of appeals read that language narrowly in *United States* v. *Carter*, *supra*.

act did not qualify as the required pattern of racketeering acts and accordingly invalidated the conviction. Thus, the defendant's conviction would have been invalid regardless of the nature of the agreement required to sustain a RICO conspiracy conviction. The Second Circuit's statement of the rule that a defendant must agree to personally commit at least two predicate acts is therefore also dictum.

*Ruggiero*, like *Winter*, was decided without the benefit of the analysis in *United States* v. *Carter*, *supra*, and the other court of appeals decisions that have adopted what has become the majority rule. Indeed, the *Ruggiero* court stated that it considered its construction of Section 1962(d) to be required by "[p]revailing case law" (726 F.2d at 921). Since 1984, every court that has addressed the issue has adopted the majority rule, which applies to RICO conspiracy the principles of general conspiracy law. In light of that developing trend, the Second Circuit, like the First Circuit, may be prepared to reconsider its dictum in *Ruggiero* when it is presented with a case that requires it to decide whether to adopt that dictum as the law of the circuit.[6]

Finally, it was not improper for the court of appeals to use the jury's response to a special interrogatory on one count to construe the jury's verdict on another count. A conviction that might have been premised on alternative grounds may be upheld if the court of appeals can determine with certainty that the actual ground relied upon by

[6] This Court has repeatedly denied certiorari in cases raising this issue in the last six years. See *Wougamon* v. *United States*, cert. denied, 488 U.S. 960 (1988); *Finestone* v. *United States*, cert. denied, 484 U.S. 948 (1987); *Stewart* v. *United States*, cert. denied, 480 U.S. 919 (1987); *Messino* v. *United States*, cert. denied, 479 U.S. 939 (1986); *Neapolitan* v. *United States*, cert. denied, 479 U.S. 940 (1986); *Adams* v. *United States*, cert. denied, 474 U.S. 971 (1985); *Tillie* v. *United States*, cert. denied, 469 U.S. 845 (1984); *Carter* v. *United States*, cert. denied, 469 U.S. 819 (1984).

the jury was a valid basis for the conviction. See *Street* v. *New York*, 394 U.S. 576, 585-588 (1969); *Stromberg* v. *California*, 283 U.S. 359, 367-370 (1931). The court of appeals therefore correctly relied on the special interrogatory response of the jury respecting the unlawful debt upon which the Count 2 RICO conviction was based as accurately indicating which unlawful debt underlay the jury's Count 3 RICO conspiracy conviction. See, *e.g.*, *Brennan* v. *United States*, 867 F.2d 111, 114-116 (2d Cir.) (guilty verdict on a substantive count may be taken as the equivalent of a special interrogatory indicating that that substantive count was one of the predicate acts on which the conviction on a RICO count was based), cert. denied, 109 S. Ct. 1750 (1989). Contrary to petitioner's contention, nothing in *United States* v. *Powell*, *supra*, requires a different result.

## CONCLUSION

The petition for a writ of certiorari should be granted as to the first question presented, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *United States* v. *Rios*, No 89-61 (Apr. 30, 1990). In all other respects, the petition should be denied.

Respectfully submitted.

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In The

# Supreme Court of the United States

October Term, 1989

GAETANO VASTOLA,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Third Circuit

## REPLY BRIEF FOR PETITIONER

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## REPLY BRIEF FOR PETITIONER

This reply is submitted primarily to address the Government's startling suggestion that the petition for a writ of certiorari be granted only as to the first question presented, and the case remanded for further consideration in light of *United States v. Rios*, No. 89-61 (Apr. 30, 1990), but that the petition not be granted as to the second question presented, even though the court of appeals' resolution of that question is also undermined by *Rios*. The Government's brief, in asserting that the second

question is not governed by 18 U.S.C. § 2518(8)(a), misleadingly omits that the court of appeals rejected that very contention and held that it was.

1. The Government concedes that *Rios* rejects the analysis used by the courts below in resolving the first question presented. (Brf. 8) That analysis was based on *United States v. Falcone*, 505 F.2d 478 (3d Cir. 1974), which held that a delay in sealing tape recordings, in violation of 18 U.S.C. § 2518(8)(a), is not sufficient reason to suppress them so long as the integrity of the tapes is preserved. *Rios* expressly disagreed with the *Falcone* holding. (Slip op. 15 n. 5.)

2. In resolving the second question presented by Petitioner, the courts below employed the same analysis. Although that question did not involve a delay in sealing, but rather the unauthorized release of the original tapes[1] to a private individual in violation of unsealing orders, the court of appeals, in a lengthy discussion, determined that 18 U.S.C. § 2518(8)(a) governed the issue. (Pet. App. 65-71) The court of appeals expressly rejected the argument renewed by the Government here that "the consequences of an unauthorized transfer of custody to a third party is not governed by 18 U.S.C. 2518(8)(a)." (Brf. 9)

Citing *United States v. Falcone*, however, the court of appeals held that, notwithstanding the Government's infraction of the custody requirements of the unsealing

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[1] The Government's characterization of these tapes as an "identical set of original tapes" (Brf. 4, 9) is nonsensical. The tapes given to the private individual were *the* original tapes. The Government retained a *copy* of these tapes. There was only one set of original tapes.

orders, the tapes would not be suppressed without proof of tampering. (Pet. App. 71-73) The court expressly noted, but declined to follow, the holding of the United States Court of Appeals for the Second Circuit in *Rios*, 875 F.2d 17, 23 (1989), that suppression is required for unsatisfactorily explained sealing delays even absent proof of tampering, on which holding Petitioner relied and with which holding this Court ultimately agreed. (Pet. App. 72)

Obviously, then, the Government's contention here that "[t]he statutory analysis of the Court in *Rios* is inapplicable to the question whether the tape recordings should be suppressed because they were provided to a private party without court authorization after the courts ordered them unsealed" (Brf. 9) is incorrect. In view of the court of appeals' analyses and holdings, it would be anomalous – and surely dismaying to that court – to remand the case for reconsideration of the first question, but not the second, in light of *Rios*.

3. As to the remaining questions presented in the petition, Petitioner relies on the arguments made therein.